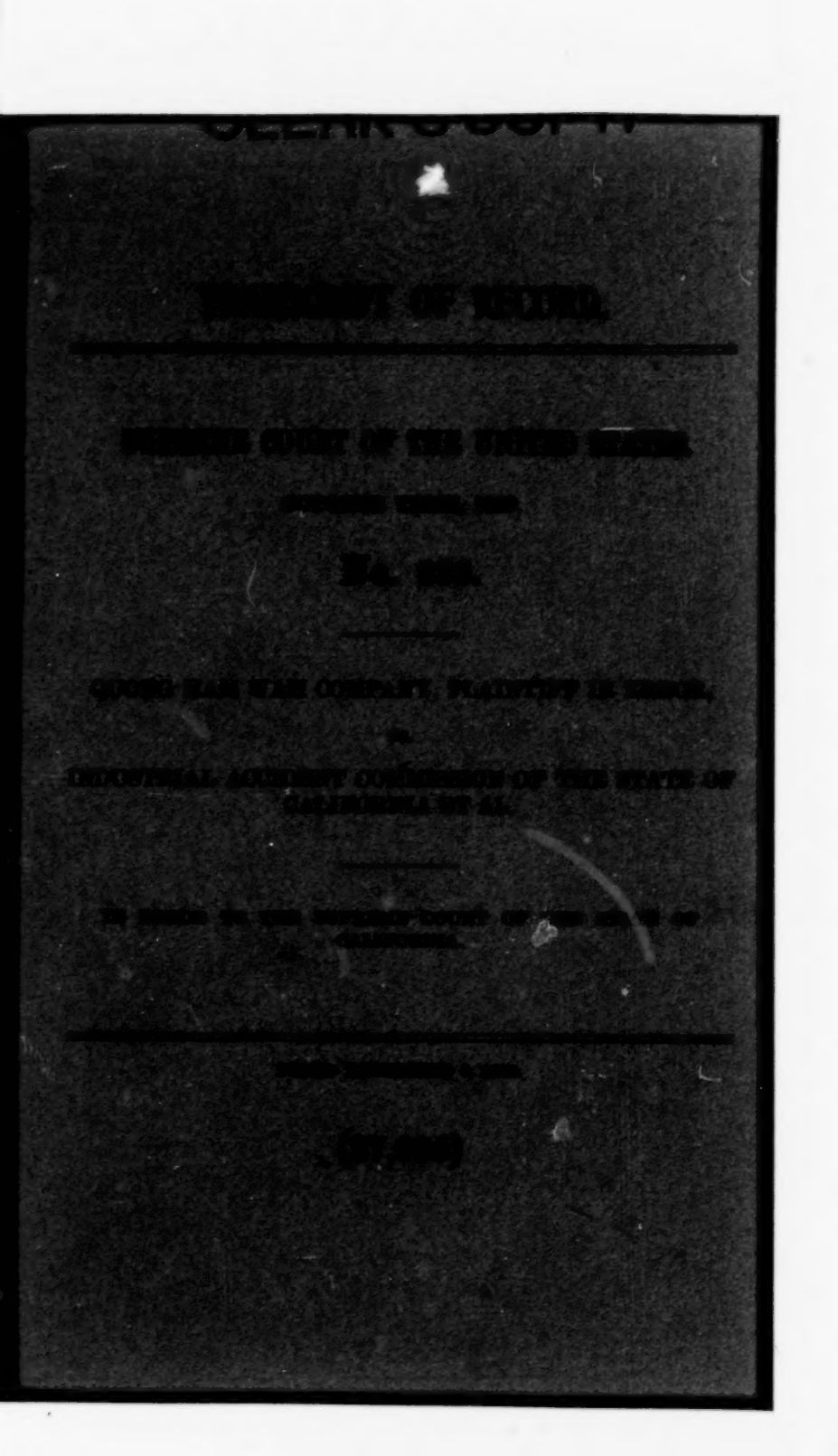

(27,995)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 638.

QUONG HAM WAH COMPANY, PLAINTIFF IN ERROR,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 4, 1921.

1 In the Supreme Court of the State of California.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French, and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Stipulation.

It is hereby stipulated that the following portions of the record herein shall constitute the transcript of record on Writ of Error herein, and that the Clerk of the above-entitled Court shall transmit said portions of said record to the Clerk of the Supreme Court of the United States, to-wit:

(1) Petition to the Supreme Court of the State of California for Writ of Review;

(2) Order of the Supreme Court of the State of California for issuance of Writ of Review;

(3) Writ of Review from the Supreme Court of the State of California;

(4) Stipulation and Return of Industrial Accident Commission;

(5) Judgment of the Supreme Court of the State of California reversing the award of the Industrial Accident Commission of the State of California, and the opinion of said Supreme Court stating the ground of its decision;

(6) Order of the Supreme Court of the State of California granting a rehearing;

(7) Judgment of the Supreme Court of the State of California affirming the award of the Industrial Accident Commission of the State of California, and the opinion of the said Supreme Court stating the grounds of its decision;

(8) Original petition for a Writ of Error, together with all endorsements thereon;

(9) Original Assignment of Errors on said Writ of Error, together with all endorsements thereon;

2 (10) Copy of the order allowing said Writ of Error and fixing supersedeas and cost bond, together with all endorsements thereon;

(11) Copy of the bond on Writ of Error and staying execution, together with all endorsements thereon;

(12) Original Writ of Error, together with all endorsements thereon;

(13) Original Citation, with proof of service thereon and all endorsements thereon;

(14) Certificate of Clerk of the Supreme Court of the State of California.

Dated: November 15th, 1920.

DELGER TROWBRIDGE,
WARREN GREGORY,
Attorneys for Plaintiffs in Error.
A. E. GRAUPNER,
WARREN H. PILLSBURY,
Attorneys for Defendant in Error, Industrial Accident Commission.
JOHN L. McNAB,
BYRON COLEMAN,
Attorneys for Defendant in Error, Owe Ming.
VINCENT I. COMPAGNO,
Attorney for Defendant in Error, Alaska Packers Association.

2 [Endorsed:] S. F. No. 9090. Clerk's Office Copy. Supreme Court of the State of California. Quong Ham Wah Company, Petitioner and Plaintiff in Error, vs. Industrial Accident Commission of the State of California et al., Defendants in Error. Stipulation as to Transcript of Record. Filed Nov. 15, 1920. B. Grant Taylor, Clerk, By E. B., Deputy. Delger Trowbridge, Warren Gregory, Attorneys for Pltff. in Error, Merchants Exchange Bld., San Francisco, Cal.

4 In the Supreme Court of the State of California.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission, and Owe Ming, Respondents.

Petition for Writ of Review.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of California:

Your petitioner, Quong Ham Wah Company, respectfully applies to the above entitled Court for a writ of review for the purpose of having determined the lawfulness of the original order or award of Respondents, A. J. Pillsbury, Will J. French and Meyer S. Lissner as members of and constituting the Industrial Accident Commission of the State of California in the matter before it entitled "Owe Ming, Applicant, vs. Alaska Packers Association and Quong Ham Wah Company, Defendants" and Numbered Claim 6014, and also for the purpose of having determined the lawfulness of all orders of said Respondents in said matter, and in that behalf your petitioner respectfully shows:

5 I.

That petitioner is, and was at the times herein mentioned, engaged in the general merchandise business and also in the business of hiring laborers and furnishing labor to various canneries within and without the State of California, among others to the Alaska Packers Association, a corporation at its Cook's Inlet cannery in the Territory of Alaska.

II.

That at all times herein mentioned A. J. Pillsbury, Will J. French and Meyer S. Lissner were and are the duly appointed, qualified and acting members of the Industrial Accident Commission of the State of California, and that said last named persons constitute and were and are the members herein mentioned, and now constitute and are the Industrial Accident Commission of the State of California.

III.

That on the 11th day of October, 1918, there was presented to and filed with said Commission an application signed by Owe Ming, one

of the Respondents herein named, wherein said applicant set forth that he was injured in Alaska on the 30th day of July, 1918, while he was in petitioner's employ, and that as a result of being injured on the day and year aforesaid he had sustained a permanent disability and wherein he prayed for compensation under the Workmen's Compensation, Insurance and Safety Act of 1917.

IV.

That thereafter, your petitioner herein filed an answer to said application, wherein it denied all liability for the accident set forth in said application.

6

V.

That thereafter, the said application was heard and tried by said Commission.

VI.

That upon said hearing before the Commission the following evidence, briefly stated, was introduced:

That on the 30th day of July, 1918, and at the time of the accident occurring on said date said applicant was a resident of the State of California and was acting under a contract of employment by petitioner made in the State of California; that said applicant was injured while acting in the course of his said employment on said 30th day of July, 1918, at Cook's Inlet, Alaska; and that as a result of said accident he sustained a permanent disability.

VII.

That on the 10th day of March, 1919, said Commission made and filed its findings and award; that said findings and award were signed by all the members of said Commission; that a copy of said findings and award are hereunto annexed, marked Exhibit "A" and made a part hereof; that in said award said Commission awarded Applicant the sum of Four Hundred and Sixty-four and 85/100 Dollars ($464.85).

VIII.

That thereafter, and to-wit: on the 25th day of March, 1919, said petitioner filed with said Commission a verified petition for a rehearing as required by Section 64 of said Act, and duly served a copy thereof on all the adverse parties, including said applicant.

IX.

7 That said petition for a rehearing was based upon the ground that said Commission acted without and in excess of its powers for the particular reasons set out and specified in paragraph XV hereof.

X.

That on April 26th, 1919, said Commission, by a majority of its members denied said application of petitioner for a rehearing.

XI.

That, so far as your petitioner is advised, the only persons or corporations beneficially interested in this proceeding for a review, and the only persons or corporations interested besides your petitioner and the Industrial Accident Commission of the State of California and its members are Owe Ming, the Applicant before said Commission, and Alaska Packers Association, a corporation, which was joined with your petitioner as a Defendant before said Commission.

XII.

That your petitioner has paid no part of the amount of said award.

XIII.

That in and by said Workmen's Compensation, Insurance and Safety Act of 1917 it is provided that upon the application for, or the pendency of, a writ of review, the Court before which such application is filed may, in its discretion, stay or suspend, in whole or in part, the portion of the order, award, rule or regulation of the Commission subject to review upon such terms and conditions as may be ordered, subject also to the filing of a written undertaking by petitioner as subscribed in Section 68, Subdivision C of the aforesaid Act. Said petitioner desires a stay and suspension of said
8 award and order of said Commission pending the hearing and decision of this Honorable Court; that your petitioner is solvent and entirely responsible for the amount of said award, and petitioner prays that a stay and suspension of said award and order be granted on condition that petitioner file a written undertaking required by Section 68, Subdivision C of said Act.

XIV.

That said petitioner applies for this writ of review upon the ground that said Industrial Accident Commission, exercising judicial functions, has exceeded its jurisdiction and has not regularly pursued its authority, and that there is neither an appeal nor any plain, speedy or adequate remedy for such excess of jurisdiction or such irregular pursuit of authority. The reason the application is made originally to this Court is that petitioner is by said Act given the option of applying to this Court.

XV.

That said petitioner applies for this writ of review upon the ground that said Commission acted without authority and in excess of its

powers and jurisdiction in the matter of said application, and in the making of said order and award for the following reasons:

1. Because the said injury of said applicant, Owe Ming, occurred outside of the territorial limits of the State of California, to-wit: at Cook's Inlet, in the Territory of Alaska.

2. Because said Commission is without jurisdiction to award compensation for injuries or death occurring outside of the territorial limits of the State of California, except for the provisions of Section 58 of the Workmen's Compensation Insurance and Safety Act of 1917, and said Section 58 of said Act is void for the following reasons:

9 (*a*) Because in attempting to give the right to compensation and death benefits for injuries occurring without the territorial limits of the State of California in cases where the contract of employment is made in the State of California and the injured employee is a resident of the State of California, but withholding a like right of compensation where the injured employee under such conditions is a non-resident of the State of California, the said Section 58 violates Article IV, Section 2, paragraph 1 of the Constitution of the United States in that it grants a privilege to citizens of the State of California which it denies to the citizens of other States of the Union.

(*b*) Because in attempting to give the right to compensation and death benefits for injuries occurring without the territorial limits of the State of Cailfornia in those cases where the contract of employment is made in the State of California and the injured employee is a resident of the State of California, but withholding a like right of compensation and death benefits where the injured employee under such conditions is a non-resident of the State of California, the said Section 58 violates Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denies to persons who are not residents of the State of California the equal protection of the laws with persons who are residents of the State of California; that is to say, Section 58 of said Act grants unto residents of the State of California, injured without the territorial limits thereof, the right to compensation under said Act, and unto the dependents of such persons the right to death benefits under said Act, whereas, without any just or reasonable basis for dis-
10 crimination, Section 59 of said Act denies unto persons, other than residents of the State of California, such right of compensation, and unto the dependents of persons other than residents of the State of California, the right to such death benefits.

(*c*) Because said Section 58 of the Workmen's Compensation, Insurance and Safety Act of the State of California is violative of Article IV, Section 1 of the Constitution of the United States in that it fails to give full faith and credit to the public acts, records and judicial proceedings of other states of the Union in this; that whereas Section 58 provides that residents of California injured in

another state of the Union may recover compensation for such injuries under said Act, and that the dependents of residents of California injured in other states of the Union may recover death benefits on account of such injuries, nevertheless it is expressly provided in said Act that wherever the right to compensation or death benefits shall exist under the terms of said Act, such right shall be in lieu of any other liability whatsoever, and such remedy shall be the exclusive remedy against the employer for such injury or death.

Wherefore, petitioner prays:

1. That pending the review herein petitioned for, this Court under the provisions of Section 68 of said Workmen's Compensation, Insurance and Safety Act of 1917, stay and suspend the operation of the award sought to be reviewed herein.

2. That a writ of review issue out of this Court commanding the Industrial Accident Commission of the State of California and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission, and each of them, the Respondents herein, to supply fully to this Court at a satisfactory time
11 and place a transcript of the records and proceedings in the matter of said application and claim of Owe Ming, bearing No. 6014 of the records of said Commission in order that the same may be reviewed by this Court and that, upon such review, said order or award of said Commission may be annulled and adjudged void and of no effect; and, further, commanding said Industrial Accident Commission and its members, and each of them, in the meanwhile to desist from further proceedings in the matter to be reviewed; and for such other and further relief as may be meet and equitable in the premises.

QUONG HAM WAH COMPANY,
By LEM SEN,
Manager.

GORRILL & TROWBRIDGE,
DELGER TROWBRIDGE,
Attorneys for Petitioner.

12 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Lem Sen, being first duly sworn, deposes and says:

That he is the Manager of Quong Ham Wah Company, petitioner in the above entitled matter; that he makes this verification on behalf of said petitioner; that he has read the foregoing petition for writ of review and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and, as to those matters, he believes it to be true.

LEM SEN.

Subscribed and sworn to before me this 5th day of May, A. D. 1919.

[SEAL.] HENRIETTA HARPER.
Notary Public in and for the City and County of San Francisco, State of California.

13 EXHIBIT "A."

Copy.

Filed Mar. 10, 1919.

Before the Industrial Accident Commission of the State of California.

Claim No. 6014.

OWE MING, Applicant,

vs.

ALASKA PACKERS ASSOCIATION and QUONG HAM WAH CO., Defendants.

Findings and Award.

This cause came on for decision by the Industrial Accident Commission of the State of California at its office at 525 Market Street, San Francisco, California, on Monday, the 24th day of February, 1918, at 10 o'clock a. m.

Said decision was rendered upon testimony and stipulations taken at preliminary hearings held at said office on the 7th day of November, 1918, at 2 o'clock p. m., by Duncan McPherson, Jr., Referee, and on the 14th and 21st days of November, 1918, at 2 o'clock p. m., by L. C. Brown, Referee.

At each of said preliminary hearings, the applicant, Owe Ming, was represented by John L. McNab and Byron Coleman, attorneys-at-law. Defendant Alaska Packers Association was represented by Chickering & Gregory, attorneys-at-law, Mr. A. C. Van Fleet appearing. Defendant Quong Ham Wah Co. was represented by Delger Trowbridge, attorney-at-law.

The cause having been submitted for decision, this Commission makes its Findings and Award as follows:

Findings of Fact.

1. That Owe Ming, hereinafter called the employee, the applicant herein, was injured on the 30th day of July, 1918, at Cook's
14 Inlet, Alaska, while in the employment of defendant Quong Ham Wah Co., hereinafter called the employer, as a machine tender. That at said time said employee was a resident of, and his contract of hire was made within, the State of California.

2. That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, and happened in the following manner: While cleaning an oil hole on a machine he was tending his minor hand was caught and injured, necessitating the amputation of part of the thumb and index finger.

3. That at the time of said injury the employee was not engaged in any of the occupations or employments excluded by Section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917 from the provisions of said Act.

4. That the employer had knowledge of the said injury as defined by Section 15 of said Act.

5. That the medical, surgical and hospital treatment required to cure and relieve the employee from the effects of said injury was provided by the defendant Alaska Packers Association.

6. That the monthly earnings of the employee at the time of said injury were seventy-two dollars and fifty cents ($72.50). That the average weekly earnings were fifteen dollars and ninety cents ($15.90); and 65 per cent thereof is ten dollars and thirty-three cents ($10.33).

7. That at the time of said injury the occupation of the employee was that of machine tender and his age thirty-two years. That by reason of said injury he suffered a permanent partial disability consisting of amputation of the index finger near the second joint and the thumb near the distal joint, of the minor hand and equaling 11¼ per cent of total disability, and entitling him to a disability indemnity of ten dollars and thirty-three cents ($10.33) per week for a period of forty-five weeks from the eleventh day after said injury (August 10, 1918), amounting to the total sum of four hundred sixty-four dollars and eighty-five cents ($464.85); and that the amount of such indemnity accrued and payable for the period of thirty weeks up to and including the 8th day of March, 1919, equals the sum of three hundred nine dollars and ninety cents ($309.90).

8. That John L. McNab and Byron Coleman have rendered services in this proceeding, as attorneys for the applicant, of the reasonable value of fifty dollars ($50.00), and are entitled to a fee payable by the applicant in said amount.

9. That said employer was not insured against liability under said Act. That defendant Alaska Packers Association, hereinafter called the association, had undertaken with defendant Quong Ham Wah Co. to have executed the work upon which said employee was engaged at the time of said injury, upon premises which were at that time under the control and management of said association, and said injury occurred on such premises. That said association was

therefore at the time of said injury the principal employer of said employee, and is liable to him, as such, for said injury.

10. That applicant's conduct in cleaning said oil hole in the manner in which he did it, was negligent but was not in violation of any rule or regulation of said employer or principal employer, and was not serious and wilful misconduct under the terms of said Act.

11. That the service and wages of said employee commenced when he placed himself at the disposal of said employer on the vessel, at San Francisco, California. That said contract of hire was therefore in part performed in the State of California, and under the provisions of Section 1646 of the Civil Code, may be interpreted according to the law of this state.

12. That there is no law in the Territory of Alaska providing compensation, irrespective of negligence on the part of the employer, for injuries to employees. That applicant's injury hereinabove described was not caused by negligence on the part of said employer, and applicant's only remedy is therefore under the laws of the State of California.

13. That defendant association is not deprived by the provisions of Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917, of any privilege or immunity in violation of Section 2 of Article IV of the Constitution of the United States. That said Section 58 does not abridge any privilege or immunity of said association as a citizen of the United States, nor deprive said association of life, liberty or property without due process of law, nor deny to said association the equal protection of the laws. That, therefore, under the decision of the Supreme Court of this State in the case of Schillinsky vs. Steamer "Bandon," et al., (55 Cal. Dec. 521, 5 I. A. C. Dec. (Cal.) 65), said defendant cannot contest the constitutionality of said Section 58.

14. That Section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917, giving to this Commission jurisdiction to determine controversies arising under said section, is adequately sustained by the provisions of Section 17½ of Article XX of the Constitution of the State of California. That it is not in violation of Section 21 of said article, and any want of authorization in said Section 21 for said grant of jurisdiction, is supplied by said Section 17½.

15. That said Workmen's Compensation, Insurance and Safety Act was enacted before the contracts between said association and said employer and between said employer and employee were entered into and therefore cannot impair the obligation thereof in violation of Section 10 of Article I of the Constitution of the United States.

Award.

Now therefore, in conformity with the foregoing Findings,

Award is hereby made in favor of Owe Ming, the applicant herein, against Quong Ham Wah Co. and Alaska Packers' Association, the defendants herein, and each of them, of the sum of four hundred sixty-four dollars and eighty-five cents ($464.85), payment thereof to said applicant to be as follows:

1. Cash in hand the sum of three hundred nine dollars and ninety cents ($309.90), this amount being the sum of weekly payments of said disability indemnity accrued up to and including the 7th day of March, 1919; less, however, the sum of fifty dollars ($50.00) to be deducted therefrom and paid to John L. McNab and Byron Coleman as a fee, as attorneys for the applicant herein.

2. The further sum of ten dollars and thirty-three cents ($10.33) a week, payable weekly in advance beginning with the 8th day of March, 1919, for the period of fifteen consecutive weeks, thus completing the payment of said total sum of four hundred sixty-four dollars and eighty-five cents ($464.85), and

It is further ordered that execution shall not be levied upon or issued against the property of defendant Alaska Packers Association unless, and until, execution against the property of defendant Quong Ham Wah Co. shall have been returned unsatisfied in whole or in part.

Dated at San Francisco, California, this 10th day of March, 1919.

[SEAL.] INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA.
A. J. PILLSBURY,
WILL J. FRENCH,
MEYER LISSNER,
Commissioners.

Attest:
H. L. WHITE,
Secretary.

L. C. B.:E. B. P.

18 [Endorsed:] S. F. No. 9090. In the Supreme Court of the State of California. Quong Ham Wah Company, plaintiff, vs. Industrial Accident Commission of the State of California et al., respondents. Petition for writ of review. Filed May 8, 1919. B. Grant Taylor, clerk, by Erb, deputy. Gorrill & Trowbridge, attorneys for petitioner, 948 Mills Building, San Francisco.

19 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming and Alaska Packers Association, a Corporation, Respondents.

Order for Issuance of Writ of Review.

By the Court:

Ordered that a writ of review issue as prayed for in the within petition, returnable before the court, at its courtroom in San Francisco, on Monday June 2, 1919, at 10 o'clock a. m.

Further ordered that in addition to the service required by law copies of the within petition and of this order be served on Owe Ming and the Alaska Packers Association, named herein as parties interested, at least 10 days before said June 2, 1919.

ANGELLOTTI,
C. J.

Dated: May 12, 1919.

[Endorsed:] Filed May 12, 1919. B. Grant Taylor, clerk, by Erb, deputy.

20 [Endorsed:] S. F. No. 9090. In the Supreme Court of the State of California. Quong Ham Wah Company, petitioner, vs. Industrial Accident Commission of the State of California et al., respondents. Order for issuance of writ of review. Filed Nov. 8, 1920. B. Grant Taylor, clerk, by M., deputy. Delger Trowbridge, Warren Gregory, attorneys for petitioner, Merchants Exchange Bldg., San Francisco, Cal.

21 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French, and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming and Alaska Packers Association, a Corporation, Respondents.

Writ of Review.

The People of the State of California to Industrial Accident Commission of the State of California, and A. J. Pillsbury, Will J. French, and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming and Alaska Packers Association, a Corporation:

Whereas it has been represented to the above entitled Court by the verified petition of the above named petitioner that lately before the Respondents, Industrial Accident Commission of the State of California and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission, such proceedings were had that the said respondents irregularly and without authority or jurisdiction in the premises made an order or award to the respondent Owe Ming in the proceeding wherein said Owe Ming was applicant and the above named petitioner and respondent Alaska Packers Association, a corporation, were defendants Numbered 6014 in the records of said Commission; and this Court being willing that the said proceedings of the said respondents Industrial Accident Commission of the State of California, and A. J. Pillsbury, Will J. French and Meyer S. Lissner as members of and constituting said Commission, in the premises and pertaining thereto shall be certified and returned by them unto this Court in the Court-room of said Court in the Wells Fargo Building, corner of Second and Mission Streets in the City and County of San Francisco, State of California on Monday, June 2, 1919, at 10 o'clock A. M.

22

The respondents Industrial Accident Commission of the State of California and A. J. Pillsbury, Will J. French and Meyer S. Lissner as members of and constituting said Commission, are hereby commanded to certify and return unto this Court at said time and place all the proceedings concerning the said order or award taken before them, or occurring before them, so that this Court may further act thereon as of right and according to law ought to be done and that they have then and there with them this writ.

Witness the Honorable F. M. Angellotti, Chief Justice of the Supreme Court of the State of California this 14th day of May, 1919.

B. GRANT TAYLOR,
Clerk,

[SEAL.] By W. R. MACKRILLE,
Deputy Clerk.

23 Receipt of a copy of the within writ, of the order for the issuance of the same, and of the petition for the same is hereby admitted this 14th day of May, 1919.

A. E. GRAUPNER,
Attorney for Respondents,
Ind. Acc. Com. and Its Members.
JOHN L. McNAB &
BYRON COLEMAN,
Attorneys for Applicant, Owe Ming.
CHICKERING & GREGORY,
Attys. for Alaska Packers.

[Endorsed:] S. F. No. 9090. In the Supreme Court of the State of California. Quong Ham Wah Company, Petitioner, vs. Industrial Accident Commission of the State of California et al., Respondents. Writ of Review. Endorsed. Filed May 15, 1919. B. Grant Taylor, Clerk, by Erb, Deputy. Delger Trowbridge and Warren Gregory, Attys. for Petitioner, Merchants Exchange Bldg., San Francisco, Cal.

24 In the Supreme Court of the State of California.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al., Respondents.

Stipulation.

It is stipulated by and between counsel for petitioner and counsel for respondents as follows:

I.

That the Findings and Award of the respondent Industrial Accident Commission, as set forth in the petition for writ of review, may constitute the return of the Industrial Accident Commission.

II.

That this matter may be submitted upon briefs, petitioner to have thirty days to file opening brief, respondents thirty days for answering brief, and petitioner fifteen days to reply thereto.

GORRILL & TROWBRIDGE,
DELGER TROWBRIDGE,
Counsel for Petitioner.
CHICKERING & GREGORY,
Counsel for Respondent, Alaska Packers Association.
A. E. GRAUPNER,
Counsel for Respondent, Industrial Accident Commission and Its Members.
JOHN L. McNAB &
BYRON COLEMAN,
Attys. for Respondent, Owe Ming.

So Ordered:

——— ———,
Chief Justice.

Dated June 2, 1919, at San Francisco, California.

Filed 6/2/19.

25 [Endorsed:] No. 9090. In the Supreme Court of the State of California. Quong Ham Wah Company, Petitioner, vs. Industrial Accident Commission of the State of California et al., Respondents. Stipulation. Filed June 2, 1919. B. Grant Taylor. Delger Trowbridge, Warren Gregory, Attys. for Petitioner, Merchants Exchange Bldg., San Francisco, Cal.

26 Filed Dec. 26, 1919. B. Grant Taylor, Clerk. By Dryden, Deputy.

In the Supreme Court of the State of California.

In Bank.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting Said Commission, and Owe Ming and Alaska Packers Association, a Corporation, Respondents.

Certiorari to review the action of the Industrial Accident Commission in making an award pursuant to the terms of section 58 of the Workmen's Compensation Act as amended in 1917:

Section 58 reads as follows: "The commission shall have jurisdiction over all controversies arising out of injuries suffered
27 without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1917, page 870.)

Petitioner, the employer of the injured workman, attacks the validity of this statute on the ground that it violates section 2 of article IV of the constitution of the United States which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." The first question presented is whether or not petitioner is in a position to attack the constitutionality of the statute.

The provision of the Workmen's Compensation Act now under attack is identical in phraseology with that considered by this court in Estabrook v. Ind. Acc. Com., 177 Cal. 767. It was held in that case that the employer was not in a position to question the constitutionality of the statute. The court relied upon the general rule that a contention that a statute makes an unlawful discrimination between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against. This general rule is not an arbitrary one, but is based upon considerations of policy and convenience and is subject to certain well established exceptions. The petitioner has, we think, brought itself within one or more of those exceptions. We are, therefore, constrained to overrule the case of Estabrook v. Ind. Acc. Com., supra.

Where no member of a class alleged to unlawfully discriminated
against by a statute is in a position to raise the constitutional
28 question, then any person affected by the application of the statute can urge its unconstitutionality. In Green v. State, 119 N. W. [Neb.] 6, the plaintiff in error was convicted under a statute making it a penal offense to commit "blackmail" against citizens or residents of the state of Nebraska. On appeal he urged that the statute was unconstitutional by reason of the fact that it operated to protect only citizens and residents of the state of Nebraska and therefore unlawfully discriminated against the citizens and residents of all other states. In upholding this contention, the court said: "We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose right it does not affect, and who has therefore no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without just reason for such discrimination, it is safe to leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression

thereby forbidden is committed. In such cases there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the legislature should enact a law amending our Criminal Code so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void, but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection of its validity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void."

While it is true that the language above quoted was used in a criminal case, the decision was not placed upon the grounds of an exception peculiar to cases involving life or liberty. An unconstitutional law is a nullity. It is no law. It would be most manifestly contrary to every consideration of policy and reason for a court to recognize that a given enactment is absolutely void and at the same time to place itself in a position where it must for all time uphold as valid the rights and obligations purported to be created by the enactment by reason of the fact that no member of the class discriminated against could ever have standing in the court to raise the constitutional question. In the instant case the Compensation Act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim under the act. And, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensation nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, we are of the opinion that the petitioner is entitled to assail the constitutionality of the statute because its rights are directly affected thereby.

Moreover, aside from the consideration that no member of the class discriminated against can raise the constitutional question, the fact that the rights of petitioner are directly affected in the present proceeding standing alone entitles it to assail the statute. This proposition is established by the case of Buchanan v. Warley, 245 U. S. 60, which, by the way, was decided several years later than Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, which was relied upon in the Estabrook case, supra. In Buchanan v. Warley a vendor of land sued to compel the vendee, a colored person, to receive and pay for a certain parcel of land which he had agreed to buy. Defendant had judgment in the lower courts solely because of the effect of an ordinance making it illegal for colored persons to occupy the

land in question. Plaintiff contended that the ordinance was unconstitutional for the reason that persons of color were unlawfully discriminated against. His right to assail the statute on the ground stated was questioned on the theory that he was not a member of the class discriminated against. In disposing of this contention the court said: "The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own
31 and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved." Respondent suggests that the reasoning of this case must be confined to those situations where an unconstitutional enactment interferes with an affirmative right of one not discriminated against and that it should not be extended to a case where the enactment merely creates a liability against such a person. There is no merit in the suggestion. An unconstitutional enactment which deprives a person of his property violates his rights and gives him a grievance of his own in the same sense and with the same effect as an enactment which interferes with the affirmative right to alienate his property such as that involved in Buchanan v. Warley, supra. In both cases the property rights of the individual are directly and necessarily involved. The liability which it is sought to have imposed upon the petitioner in the instant case amounts to several hundred dollars. Its property rights are invaded as tangibly and substantially, we think, as are those of an individual whose right to sell his property is incidentally affected by an ordinance forbidding colored persons to personally occupy the property in question.

Our conclusion is further fortified by the recent decision of the United States Supreme Court in Middleton v. Texas Power & Light Co., reported in 39 Supreme Court Reporter, 227. In that case a workman was seeking to recover at common law for injuries sustained in an industrial accident. He attacked the constitutionality of the Texas Compensation Act on the ground that it unlawfully discriminated against certain classes of workmen. He was not a member of any class claimed to be discriminated against. The court held that while he could not be heard to raise the question of the statute in reliance on the grievance of other persons,
32 nevertheless, as a member of a class to which the act was made to apply he had a grievance of his own if he was deprived of his common law rights by legislation void by reason of the discrimination charged. The court thereupon undertook to consider on its merits the claim that the act was unconstitutional thus indicating that it regarded as a fundamental fact what it had expressly stated, namely that plaintiff had a grievance of his own and was, therefore, entitled to raise the constitutional question and that the court was consequently bound to consider it. The Middle-

ton case is thus "on all fours" with the instant case. Petitioner herein does not rely upon the grievances of other persons in making its attack on the constitutionality of the California statute. As a member of a class to which the act is made to apply it has a grievance of its own if it is deprived of defenses otherwise valid and subsisting by legislation void by reason of discrimination against citizens of other states. The act does of course deprive it of the otherwise valid defense afforded by the fact that the applicant's injury was occasioned solely by his own negligence. The act, therefore, purports to impose a new liability and consequently does directly affect the property and rights of petitioner. If, as was held in the Middleton case, an employee deprived by the statute of his otherwise subsisting right to sue is so directly affected that he may raise the constitutional question, it necessarily follows that an employer deprived by the statute of his otherwise subsisting defenses is likewise interested to a similar extent and with like effect.

But independently of the foregoing considerations, petitioner is entitled to raise the constitutional question in this case. Apart from the statute here involved, the Industrial Accident Commission is wholly without power to hear and determine a cause wherein the injury is alleged to have occurred beyond the borders of the state, and this court is equally without jurisdiction to affirm any award which the commission may undertake to make in any such
33 case. Where the jurisdiction of the court depends upon the validity of the act, any person interested in the decision may raise the question of its unconstitutionality. The rule is stated by the Supreme Judicial Court of Massachusetts as follows: "In the first of the cases before us, a gentleman of the bar appeared as amicus curiæ, by leave of the court, representing parties interested in the decision that might be made upon the construction and effect of the statute, and presented a brief suggesting that the section under which the petitions are brought is unconstitutional. The parties who invoke the aid of the court are precluded from making this contention (Pitkin v. Springfield, 112 Mass., 509), and the respondent does not desire to make it. It is a general rule that the court will not consider the constitutionality of a statute upon an objection made by persons whose rights are not affected by it, and usually the parties to the suit are the only ones who are permitted to raise such a question. But where, as in this case, the jurisdiction of the court depends entirely upon the validity of the act, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not interested in the case before the court, we deem it our duty to consider whether we have jurisdiction, before taking affirmative action. Action of a court that has no jurisdiction is void; Belcher v. Sheehan, 171 Mass. 513, 68 Am. St. Rep. 445." (New York Life Ins. Co. v. Harrison, 85 N. E. [Mass.] 410.) For like reasons we deem it our duty to consider the question of the constitutionality of section 58 of the Workmen's Compensation Act.

We may assume, without undertaking to decide the point, that the legislature has power to enact a statute requiring employers to

34 compensate employees whose services were engaged in this state for injuries sustained in foreign territory. If, however, the legislature may give such extra territorial effect to the Workmen's Compensation Act, it can only be upon the theory that the obligation to compensate the injured employee sounds in contract and amounts to a sort of compulsory insurance. No principle of private international law is better established or more fundamentally sound than that the lex fori will not undertake to enforce an obligation in tort where the obligation was not created by the lex loci delicti. (Wharton, Conflict of Laws, 3rd ed., secs. 478*a*, 478*b*, and cases cited. Compare also Carr v. Fracis [1902] A. C. 176; Beacham v. Portsmouth Bridge, 68 N. H. 382; Leazotte v. B. & M. R. Co., 45 Atl. [N. H.] 1084; Turner v. St. Clair Tunnel Co., 70 N. W. [Mich.] 146; Hovis v. Richmond etc., Co., 16 S. E. [Ga.] 211.)

It is at once apparent that the legislature has equal power to provide for the creation of a compulsory obligation to compensate for injury suffered elsewhere as an incident to a contract of employment entered into in California whether the contracting employee be a citizen of this state or not. If therefore, the right is created only in favor of citizens of the state, there is discrimination against citizens of sister states.

Section 58 of the Workmen's compensation, Insurance and Safety Act of 1917 restricts the right to claim the benefit of the act in the case of injuries suffered abroad to employees who are residents of California at the time of the injury. It is not open to the slightest doubt that by the word "resident" the legislature intended to designate one domiciled within the state. Citizens of the United States who are domiciled in this state are citizens of the state.
35 (Pol. Code, sec. 51.) It follows that the right to compensation for injury suffered abroad is created only in favor of citizens of this state and in favor of non-citizens of the United States who chance to be domiciled in this state at the time of the injury. There is therefore a direct discrimination against aliens not domiciled in California, with which we are not concerned, and against citizens of other states of the union which, if it is without legal justificiation, renders the statute unconstitutional.

The right of the legislature to enact reasonable regulations governing the creation of contractual liability is unquestioned. When, however, the legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered into in this state by citizens of this state and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our union, the enactment is clearly violative of section 2 of article IV of the federal constitution. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to bring actions in the courts are given to

its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." (Chambers v. B. & O. R. Co., 207 U. S. 142.) It is true that many procedural discriminations between citizens and non-citizens have been upheld, but the rule applied in such situations has no
36 application where a substantial substantive right is granted to citizens and under like circumstances is denied to citizens of other states. The statute here in question provides for the creation within this state of a right to accident insurance as an incident to certain contracts of employment in favor of citizens and opens the doors of its courts and commissions to citizens to enable them to enforce that right. This right is not accorded to citizens of other states. A privilege and protection of the laws of a substantial nature is thereby accorded to citizens of this state and denied to citizens of other states. This is forbidden by the federal consitution. (Blake v. McLung, 172 U. S. 239.)

The constitution provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a state may limit the right of individuals to engage in certain professions or callings in the valid exercise of its police power. Such regulations will be upheld even though their effect is indirectly to place non-citizens at a disadvantage, but citizenship must not be made directly the basis of classification, and the regulation must be inherently reasonable. (Ex parte Spinney, 10 Nev. 323; La Tourette v. McMaster, 39 Supreme Court Reporter 160.) The principles applied in these cases cannot be invoked under the facts presented here. By reason of the fact that the distinction drawn by the statute between residents and non-residents is, as we have shown, capable of construction only as a distinction between citizens and non-
37 citizens, the discrimination in the instant case is based directly upon citizenship, and, therefore, independently of the reasonableness of the classification, the statute is violative of the constitution. But no reasonable ground can be found for the classification. Respondent makes the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. In the cases of which Ex Parte Spinney and La Tourette v. McMaster, supra, are examples, restraints upon engaging in certain occupations which bore more heavily upon citizens of other states were upheld upon the ground that the public good required that the occupations in question be opened only to those having had business or professional experience within the state, the general safety and welfare necessitating the exclusion of others. In none of these

cases was the rule sanctioned that a privilege could be granted to a citizen of one state and denied to citizens of other states for the reason that public policy did not require that the privilege be extended to the latter class of persons. Such a rule would be manifestly unsound and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in
38 question to citizens of sister states as strongly as they require their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former and affords no reasonable basis for the discrimination.

It follows that section 58 of the Workmen's Compensation Act is unconstitutional.

The award is annulled.

LENNON, *J.*

We concur:
OLNEY, *J.*
SHAW, *J.*
LAWLOR, *J.*

39 *Dissenting Opinion.*

I dissent.

In March, 1918, this court by unanimous decision in bank, decided the identical point raised here. (Estabrook v. Ind. Acc. Comm.; Klamath Steamship Co. v. Ind. Acc. Comm. 177 Cal. 767.) It is now proposed to squarely overrule that decision on the theory that in rendering it certain exceptions to the general rule relied upon were overlooked, and that the federal case therein particularly relied upon (Jeffrey v. Blagg, 235 U. S. 571) also overlooked these exceptions, and that a subsequent decision by the supreme court of the United States (Buchanan v. Warley, 245 U. S. 60) was based upon and recognized one of these exceptions, and to that extent modified the previous decision of the supreme court of the United States relied upon in the case of Estabrook v. Ind. Acc. Comm., supra. The general rule recognized in Estabrook v. Industrial Acc. Comm., and in the cases therein relied upon as authority for that decision, is that where the statute is complained of as being unconstitutional by reason of discrimination against a certain class, that persons other than members of that class cannot complain of the unconstitutionality of the law for the reason that they are not hurt by the discrimination, and not for the reason that the person raising the question is not interested in or affected by the statute claimed to be unconstitutional. Of course if it be said that every unconstitutional law is void and that every person affected thereby is therefore affected by void legislation, then it would be true that any person whose conduct is regulated by the statute would be to that extent entitled to complain of such invalidity. But this course of reasoning the supreme court of the United States has refused to follow, for the reason that the funda-

mental purpose of the fourteenth amendment to the constitution of the United States was to protect against discrimination, and it
40 was therefore held that only those discriminated against could raise the question. The substantial effect of this line of decisions is that a law, although unconstitutional as to one class by reason of discrimination against that class, can be enforced as to all others, and in all cases except where the rights of those discriminated against are involved. A similar rule applies generally to constitutional questions. As was said by the supreme court of the United States in Hatch v. Reardon, 204 U. S. 152, 160: "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." It is said that one of the exceptions to the rule stated is: "Where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality." This certainly is a strange doctrine—that a law is valid as to all classes except the class discriminated against, unless that class is precluded from making complaint, in which event the law is invalid as to every class. Such an exception overlooks the purpose of the rule, namely, to confine the complaint against such legislation to those who are injured by it, in the sense that they are deprived of a constitutional right to equal treatment. No decision of the United States Supreme Court called to our attention recognizes such an exception to the general rule.

41 It is next held that there is an exception to the rule where the rights of the party raising the question of the constitutionality of the law are directly affected by the law. On this point Buchanan v. Warley, supra, is cited as an evidence of this exception to the rule, and it is upon this theory that the majority of the court places its decision that the employer can complain that certain classes of employees are discriminated against. It should be noted that if this is an exception to the rule, then the exception is as broad as the rule, and if any such exception is established it practically overrules all those decisions maintaining and enforcing the rule that only those discriminated against can raise the constitutional question, for the exception is in effect that any one injuriously affected by a decision that the law is constitutional can claim it is unconstitutional, even though not in the class discriminated against. In other words, any one can claim the statute to be void if such a conclusion is to his advantage. An examination of the case of Buchanan v. Warley shows that the facts there involved are so different from those requiring the application of the rule under discussion, that the

rule was neither mentioned nor discussed. There a white man had sold real estate to a colored man, and in the contract it was provided that the latter would not be required to complete the purchase unless he was by law authorized to use the land purchased for a residence. The right of the plaintiff, although a white man, turned then upon the constitutionality of the ordinance, which in effect prohibited him from selling the land to a colored man for residence purposes. This invaded his right to dispose of his property. Although the colored man was seeking to sustain the validity of the ordinance and the white man to attack it, the very point involved in the controversy was the validity of that ordinance, and a member of the class discriminated against was before the court. The
42 fact that the latter took the position that the law was constitutional did not alter the fact that a member of the class discriminated against was before the court. In a recent decision by the United States Supreme Court (Middleton v. Texas Power and Light Co., 39 S. C. R. 227, 249 U. S. 152, an employee claimed that the Workmen's Compensation Law of Texas violated the Fourteenth Amendment for the reason that it excluded from its operation "domestic servants, farm laborers" etc. The employee who was not in the excepted classes brought an action for damages against the employer. The employer set up the provision of the Workmen's Compensation Act, providing an exclusive remedy for employees. There were two possible arguments: one, that the excepted class was discriminated against by being omitted from the act, and the other that the included employees were discriminated against by being included therein and thereby deprived of the usual legal remedies retained by the excepted class. In disposing of the matter the court held that the plaintiff could not be heard to complain that the omitted class was discriminated against by such omission; but that his claim that he was discriminated against by inclusion therein could be considered. Instead of claiming the benefit of the law he was seeking to escape its limitations, and as such was a person in a class discriminated against. The court said: "Of course plaintiff in error, not being an employee in any of the excepted classes, *would not be heard to assert any grievance they might have by reason of being excluded from the operation of the* act," (citing as authority for the statement the line of cases relied upon in Estabrook v. Industrial Accident Commission, supra, including Jeffrey Mfg. Co. v. Blagg, supra.) "But plaintiff in error sets up *a grievance* as a member of a class *to which the act is made to apply.*" (Italics ours.) Sure there is no suggestion here that the employer could set up the discrimination to escape liability under the act, for in no case was it discriminated against. The claim considered by the court was that
43 of a denial of the equal protection of the law, and is thus stated: "This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges *which by the act are denied to employes of the non-excepted classes,* without reasonable basis for the distinction." (Italics ours.)

In a still later case, (Arizona Copper Co. v. Hammer, 39 Sup.

Court Reporter, 553; 249 U. S.,) in an action involving the constitutionality of the Arizona Employers Liability Act, the court again relied upon Jeffrey v. Blagg, supra, and Middleton v. Texas Light and Power Co., supra, as authority for the proposition there advanced, namely, "To the suggestion that the act now or hereafter may be extended by construction to non-hazardous occupations, it may be replied: First, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question," citing the authorities above mentioned. The point involved was that the statute applied only to hazardous occupations. A decision of the supreme court of the United States, not cited by Mr. Justice Sloss in the opinion in Estabrook v. Industrial Accident Commission, is Erie Ry. Co. v. Williams, 233 U. S. 685. It was there held, quoting from the syllabus: "An employer cannot be heard to attack a state statute relating to payment of wages, on the ground that it denies to some of his employees the equal protection of the law because they are not within its protection." In that case the employer had as direct an interest in establishing the unconstitutionality of the law as he has in the case at bar, and yet it was held that he could not raise the question.

The decision by the supreme court of Massachusetts (New York Life Ins. Co. v. Hardison, 85 N. E. 410) is cited as authority for the proposition that where a jurisdictional question is involved the court will inquire into the constitutionality of the act, notwithstanding no member of the class discriminated against raises the question. That court held that they would consider whether they had jurisdiction of a writ of review from an insurance commissioner under a statute purporting to authorize them to accept jurisdiction where neither party to the action raised the question of jurisdiction. They properly held that they could not obtain jurisdiction by consent of the parties—a principle which has absolutely no application to the facts in the case at bar. We are here dealing with a question arising under the constitution of the United States, and are bound by the decisions of the supreme court of the United States. Under those decisions, as we have heretofore held in Estabrook v. Industrial Accident Commission, supra, the employer cannot complain that he is not made liable for injuries suffered by persons employed in California who are not residents of California, as well as for such residents. That is to say, he cannot complain that the law is more favorable to him than it should have been under the Fourteenth Amendment.

44

WILBUR, J.

45 Filed Jan. 22, 1920. B. Grant Taylor, Clerk, by Erb, Deputy.

Bank.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMM. et al., Respondents.

By the Court:

Upon petition for rehearing the judgment of the court heretofore entered herein is hereby vacated and set aside and the cause ordered to a rehearing before the court, for the purpose of considering the following questions, viz:

1. To what extent may the state give extra territorial effect to its laws fixing the incidents of the relation of employer and employee when such relation has its inception within the state.

2. Assuming that the state has the power to give extra-territorial effect to its laws in such a case and assuming that a discrimination is made between residents and non-residents of the state by the provisions of the Workmen's Compensation Act extending the incidents of the relation of the employer and employee therein provided for to residents but not to non-residents when the relation has its inception within the state but the injury to the employee occurs elsewhere, is such descrimination contrary to the Federal constitution, and if so, does the Federal constitution have the effect
46 of rendering invalid that portion of the Workmen's Compensation Act providing for such extension in the case of residents, or (a point not made in the original briefs) does it have the effect of allowing this portion of the act to stand as effective and valid but of extending the incidents of the relation under similar circumstances to non-residents although there is no provision in the act for such extension to non-residents.

Further ordered that upon these matters the parties be and hereby are allowed to file briefs as follows: Petitioner 30 days to file first brief. Respondent 30 days to answer and Petitioner 15 days to reply, and that upon the filing of the last brief the matter be submitted.

Dated January 22d, 1920. (All concur.)

47 [Endorsed:] S. F. 9090. California Supreme Court. Quong Ham Wah Company, petitioner, vs. Ind. Acc. Comm., et al., respondents. Opinion.

48 Filed Oct. 5, 1920. B. Grant Taylor, Clerk, by Tyler, Deputy.

In the Supreme Court of the State of California.

Bank.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer Lissner, as Members of and Constituting said Commission, and Owe Ming and Alaska Packers Association, a Corporation, Respondents.

Certiorari to review the action of the Industrial Accident Commission in making an award pursuant to the terms of section 58 of the Workmen's Compensation, Insurance and Safety Act. (Stats. 1917, p. 870.)

Upon the first hearing in this court, the award was annulled upon the theory that said section 58 of the Workmen's Compensation Act granted to citizens of this state a privilege which it denied to non-citizens and was, therefore, violative of section 2 of Article IV of the federal Constitution. (Quong Ham Wah Company v. Industrial Accident Commission, 59 Cal. Dec. 18.) Upon petition for rehearing, the judgment of this court in the first instance was set aside and the cause set down for a hearing "for the purpose of consid-
49 ering the following questions:

"(1) To what extent may the state give extraterritorial effect to its laws fixing the incidents of the relation of employer and employee when such relation has its inception within the state?

"(2) Assuming that the state has the power to give extraterritorial effect to its laws in such a case and assuming that a discrimination is made between residents and non-residents of the state by the provisions of the Workmen's Compensation Act extending the incidents of the relation of the employer and employee therein provided for to residents but not to non-residents when the relation has its inception within the state but the injury to the employee occurs elsewhere, is such discrimination contrary to the Federal Constitution, and if so, does the Federal Constitution have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for such extension in the case of residents, or, (a point not made in the original briefs), does it have the effect of allowing this portion of the act to stand as effective and valid but of extending the incidents of the relation under similar circumstances to non-residents although there is no provision in the act for such extension

to non-residents?" (Minutes of the court, 59 Cal. Dec. No. 3111).

In keeping with the order granting a rehearing, counsel for the respective parties briefed the case anew, painstakingly directing their efforts, in addition to a discussion of the points originally made, to an exhaustive exposition of the law appertaining to the subject matters designated in the order granting the rehearing. Therefore, aside from the recognition due the commendable efforts of counsel to facilitate the avowed purpose of the order, a discussion not only of the points originally made but also of those designated in the order would seem to be necessary to a decision of the case as now presented, even though the latter points were not necessarily involved in the case as prepared and presented in the first instance.

50 Section 58 of the Workmen's Compensation Act reads as follows: "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1917, p. 870.)

Petitioner, the employer of the injured workman, attacks the validity of this statute on the ground that it violates section 2 of Article IV of the Constitution of the United Staes, which provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." At the outset we are confronted again, as we were in the first instance, with the contention that the petitioner cannot be heard to question the constitutionality of the statute in cotroversy because it is not one of the class claimed to be discriminated against by the statute. The provision of the Workmen's Compensation Act now under attack is identical in phraseology with that considered by this court in Estabrook Company v. Ind. Acc. Com., 177 Cal. 767. In that case this court expressly declared that it was not required to pass upon the constitutional question sought to be raised and declined to discuss that question upon the merits because, as was held, "a contention that a statute denies equal rights and privileges by discriminating against persons and classes of persons may not be raised by one not belonging to the class alleged to be discriminated agninst." (Estabrook v. Ind. Acc. Com., supra.) Such, undoubtedly, is the general rule, but the Estabrook case is fundamentally wrong if it is to be taken as definitely deciding that there are no exceptions to the general rule enunciated therein and, if that be its purport, it should be flatly overruled, as was done by a majority of the court in the opinion rendered in the first instance in the instant case. (Quong Ham Wah Company v. Ind. Acc. Com., supra.) Apparently, however, the court in the

51 Estabrook case did no more than declare and apply the general rule that a statute purporting to make an unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against. This general rule, however, is not a hard and fast rule which must be arbitrarily and in-

flexibly applied to every situation involving the constitutionality of a statute, regardless of contingencies which may extend its operation beyond the confines of the classes which it was aimed to cover and control and which ultimately culminates in a grievance against persons not originally within the contemplation of the statute. In other words, the general rule under discussion and decision in the Etabrook case must necessarily be subject to certain well defined exceptions which, in so far as a perusal of the record in the Estabrook case shows, were not, in that case, pressed upon the attention of the court. Clearly the petitioner in the instant case has brought itself within the scope of one or more of the recognized exceptions to the general rule enunciated in the Estabrook case.

Thus, where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality. In Greene v. State, 119 N. W. 6, the plaintiff in error was convicted under a statute making it a penal offense to commit "blackmail" against citizens or residents of the state of Nebraska. On appeal he urged that the statute was unconstitutional by reason of the fact that it operated to protect only citizens and residents of the state of Nebraska, and, therefore, unlawfully discriminated against the citizens and residents of all other states. In upholding this contention the court said: "We have not overlooked those cases which hold that a court will not listen to an injection made to the constitutionality of an act by a party whose right it does not affect, and who has, therefore, no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without just reason for such discrimination, it is safe to leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and
52 such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such cases there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the legislature should enact a law amending our Criminal Code so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void, but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection to its validity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void."

Respondents suggest that the reasoning of this case is based upon an inaccurate conception of the nature and effect of an unconsti-

tutionally discriminatory statute. Such statute is, they contend, not merely presumptively valid until it is set aside by the courts, but, unlike other statutes which offend against the constitution, it is actually and legally valid until set aside. Were this view of the nature of a discriminatory statute to be accepted, the doctrine of Greene v. State, supra, might be paraphrased thus, that such a law is in fact valid as to all classes except the class discriminated against, unless that class is precluded from making a complaint, in which event the law is invalid as to every class. Such a doctrine would assuredly be strange and indefensible. The truth of the matter is, however, that a discriminatory law is, equally with other laws offensive to the constitution, no law at all. (Buchanan v. Warley, 245 U. S. 60, 72.) Whatever validity it may be said to possess, it has such validity merely by virtue of the presumption of validity attaching to the acts of the legislative branch of the government. This presumption being rebuttable may be attacked by a litigant whenever it is material to his case unless he is prevented from doing so by some special exception. Such exceptions possess no peculiar sanctity and invest the law with no actual validity; they should naturally be confined by the limits of the reasons which occasioned their adoption and should give way to considerations of policy paramount to those reasons. Such an exception exists in the matter of attack upon the presumptive validity of a discriminatory statute and is to the effect that only a member of the class discriminated against can attack the presumption. The reason for the exception is to be found in the rule that the courts will consider questions of the constitutionality of statutes only when such consideration is a necessity in the determination of a real earnest and vital controversy between individuals. The exception, if literally accepted in its general form, is broader than the reason upon which it is based; but, independently of this consideration, it must yield to a policy paramount to the reason itself where no member of the class discriminated against can raise the question. The reason for the exception is in the nature of a rule developed for the regulation of the ultimate and supreme function of the courts to declare unconstitutional statutes to be void and of no effect; and such a regulatory rule must itself be subject to exception where it would otherwise operate to prevent altogether the exercise of this function, a function which it is the most solemn duty of the courts to exercise in a state governed under a written constitution which is the supreme law of the land. Where no member of a class descriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question. In the instant case, the Compensation Act does not give the commission jurisdic-

53

tion over controversies arising out of injuries sustained abroad
54 by workmen who are not residents of California. It is clear, therefore, that a non-resident would have no standing before the commission or before any court to make a claim under the act. And, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensation nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, the petitioner is entitled to assail the constitutionality of the *state* since a determination of that question is clearly relevant in determining its rights herein.

Moreover, the fact that the constitutional rights of petitioner are directly affected by the statute here in question shows that the determination of the constitutionality of a discriminatory statute may be a necessity in the determination of a real and vital controversy between parties neither one of whom is a member of the class discriminated against, and that, therefore, the general rule that only members of the unfavored class may attack the enactment is broader than the reason upon which it is based. In this behalf respondents suggest that the cases indicate that the constitutionality of a discriminatory statute can be raised only by one injured by the discrimination and in no case by one whose constitutional or other rights are injured by the legislation. A careful analysis of the cases presented fails to support this theory. Moreover, the Supreme Court of the United States has announced and acted upon the contrary rule in Buchanan v. Warley, supra, a decision which is precisely in point in the instant case. In that case a vendor of land, a white man, sued to compel the vendee, a colored person, to receive and pay for a certain parcel of land which he had agreed to buy. Defend-
ant had judgment in the lower court solely because of the ef-
55 fect of an ordinance making it illegal for colored persons to reside upon the property in question. Plaintiff contended that the ordinance was unconstitutional for the reason that persons of color were unlawfully discriminated against. His right to assail the statute on the ground stated was questioned on the theory that he was not a member of the class discriminated against. The court clearly recognized, as it has done both in earlier and in subsequent cases, that in general one cannot assail the constitutionality of a statute in reliance upon the grievance of another, but it pointed out that while plaintiff had no grievance by reason of the discrimination, he had a grievance by reason of the legislation which by narrowing the market for his land deprived him of property, such deprivation being without due process of law in event the statute was for any reason unconstitutional. The court proceeded, therefore, to consider the merits of the constitutional question of discrimination. That case is precisely in point here for, in the instant case, while petitioner has no grievance by reason of any discrimination, it has a grievance by reason of the legislation which, by imposing upon it the liability of an insurer for certain classes of its employees, operates to deprive it of property, such deprivation being without due process of law in event the statute is for any reason unconstitutional. The constitu-

tional question of discrimination must therefore be discussed and decided.

Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917 restricts the right to claim the benefit of the act in the case of injuries suffered abroad to employees who are residents of California at the time of the injury. Since the act assumes that at the time of the injury the employee will be beyond the
56 boundaries of the state, the word "residents" must necessarily have been used to designate "persons domiciled in" California. Citizens of the United States domiciled in California are citizens of the state. (Cal. Political Code, sec. 51.) The benefits of the act are therefore extended solely to citizens of California and to aliens domiciled within the state. It follows that there is a direct discrimination against aliens not domiciled in California, with which we are not concerned, and against citizens of other states of the union which, if without legal justification, renders the statute unconstitutional. (Blake v. McClung, 172 U. S. 239, 247; 176 U. S. 56, 67.)

Respondents contend that the discrimination is justified upon the ground that the obligation imposed upon employers by the act is created as an incident to the status of master and servant and is, therefore, an obligation which can be created only by the law of the place of injury or by the law of the place of the servant's domicile. Were this reasoning sound it would follow that, in making the discrimination in section 58 of the act upon the basis of domicile, the legislature was merely recognizing a jurisdictional limit upon its power. Respondents' theory is based, however, upon a misconception of the nature of the statute and of the meaning of the term "extraterritorial" as that term is used in describing the operation of the statute.

The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one state may be recognized and enforced by another state at its pleasure, and likewise a status attached to a person by one state may be recognized by another state, into which that person may travel, at the pleasure of the latter state, but as law the man-
57 dates of the sovereign of a given state can have no effect beyond the territorial limits to which his rule is extended. When, therefore, it is said that a statute, such as the Workmen's Compensation Act, has an extraterritorial effect, it cannot mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or conditions for the enforcement, of a right created and enjoyed within this state. The power of an absolute sovereign to thus sanction the enforcement, within the territory subject to the jurisdiction of that sovereign, of rights based upon acts occurring abroad cannot be questioned upon the ground of any inherent deficiency. It is, therefore, a power which may be exercised by this state subject only to the restrictions of the state and federal constitutions. We may assume, in accordance with the contention of respondents, that, if the imposition of the obligation to compensate a servant not domiciled within the state

for injuries sustained without the geographical limits of the state were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined legal principles. Whether such a law would amount to a mere regulation of status or to an expression of a positive duty the breach of which would be tantamount to a tort, it may be conceded that a law of that nature would not lie within the law-making province of a state wheih was neither the domicile of the servant nor the locus delicti. The effect and purpose of the act now under consideration, however, cannot be held to be the regulation of a status or imposition of a tort liability. It is true that the extension of the liability imposed by the act to acts occurring beyond the territorial limits of the state cannot be supported on the simple theory that the obligation so
58 imposed is, strictly speaking, purely a contractual liability, for the proposition that a compulsory statute is a contract has been definitely repudiated by this court. (North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1.) But the statute which is now before us assumes to extend its effect only to those cases where the contract of hire was made in this state. It is, therefore, not an attempt to create an obligation merely as an incident to a status but is, in form and substance, a genujne regulation of contracts subject to the sovereignty of the state. The liability which it imposes is, so to speak, in a class by itself, being neither strictly contractual nor delictual, and it may, for want of a better term, be described as quasi ex contractu. (Post v. Burger, 216 N. Y. 544, 550; 111 N. E. 351, Ann. Cas. 1916B 158; Berton v. Dry Dock Co., 219 Fed. 763.) The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad amounting to a sort of compulsory insurance. The legislature may lawfully impose that right and duty upon those operating under a contract subject to the legislative power, and no principle of law is defeated by attaching to such contracts the same duties and rights as incidents to acts abroad that are lawfully imposed as incidents to the same acts occurring within the geographical limits of the state. (Angell on Recovery under Workmen's Compensation Law for Injuries Abroad, 31 Harvard Law Review, 16; Smith v. Heine Safety Boiler Co., 224 N. Y. 9; Jenkins v. T. Hogan & Sons, 163 N. Y. S. 707, 177 App. Div. 36.)

It is at once apparent that the legislature has equal power to provide for the creation of a compulsory obligation to compensate for injury suffered elsewhere as a regulation of contracts subject
59 to the sovereignty of the state whether the contracting employee be domiciled in this state or not. (Story on Conflict of Laws, 8th ed., p. 375; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 416.) Since, therefore, the right is created only in favor of citizens of the state and domiciled aliens, there is a direct discrimination against citizens of sister states.

The right of the legislature to impose reasonable regulations upon contracts subject to its sovereignty is unquestioned. When, however, the legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered

into in this state by citizens of this state and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our union, the enactment is clearly in contravention of section 2 of article IV of the federal constitution. "Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin action in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." (Chambers v. B. & O. R. Co., 117 U. S. 142.) It is true that many procedural discriminations between citizens and non-citizens have been upheld, but the rule applied in such situations has no application where a substantial substantive right is granted to citizens and under like circumstances is denied to citizens of other states. The statute here in question provides for the creation within this state of a right to accident insurance as an incident to certain contracts of employment in favor of citizens and opens the doors of its courts and commissions to citizens to enable them to enforce that right. This right is not accorded to citizens of other states. A privilege and
60 protection of the laws of a substantial nature is thereby accorded to citizens of this state and denied to citizens of other states. This is forbidden by the federal constitution. (Blake v. McClung, 172 U. S. 239.)

The constitution provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a state may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld even though their effect is indirectly to place non-citizens at a disadvantage, but the regulation must be inherently reasonable. (Ex parte Spinney, 10 Nev. 323; La Tourette v. McMaster, 39 Supreme Court Reporter, 160.) The principles applied in these cases cannot be invoked under the facts presented here. No reasonable ground can be found for the classification. Respondents make the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. In the cases of which Ex parte Spinney and La Tourette v. McMaster, supra, are examples, restraints upon engaging in certain occu-
61 pations which bore more heavily upon citizens of other states were upheld upon the ground that the public good required that the occupations in question be opened only to those hav-

ing had business or professional experience within the state, the general safety and welfare necessitating the exclusion of others. In none of these cases was the rule sanctioned that a privilege could be granted to a citizen of one state and denied to citizens of other states for the reason that public policy did not require that the privilege be extended to the latter class of persons. Such a rule would be manifestly unsound and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister states as strongly as they require their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former and affords no reasonable basis for the discrimination.

It follows that the discrimination made in section 58 of the Workmen's Compensation Act contravenes the provisions of the federal constitution.

It is contended, however, and correctly, that the provisions of the federal constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid and automatically and without regard to the intent of the state legislature extends the benefits created by the act to non-residents, or rather to such non-residents as are citizens of sister states. In support of this contention respondents rely upon Estate of Johnson, 139 Cal. 532. No good reason has been advanced for departing
62 from the doctrine therein declared as follows: "It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, 'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, ex proprio vigore, becomes an express part of such statute. * * * The constitution itself becomes a part of the law. And this, in giving operation to that con-

stitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal
63 footing." This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the Slaughter-House Cases, 16 Wall. 36, 77, in the following words: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to non-residents of the state and clearly the statute in question does not impose nor attempt to impose upon non-citizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all important in controlling the construction and application of that provision of the federal constitution which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." For, where a state endeavors to place a burden upon non-citizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal constitu-
64 tion operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of non-citizens and, therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the non-citizen. Viewed in this light, it is clear that, when a state statute imposes a burden on a non-citizen which is not imposed on the citizen of the state, the non-citizen may have relief from the burden thus imposed by invoking the provision of the federal constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a non-citizen, the latter finds relief in the provision of the federal constitution which, by operation of law so to speak, extends the privilege to him. The obvious resulting difference in the opera-

tion and effect of the federal constitutional provision under discussion is the paramount point of the decision in the Estate of Johnson, supra, and it cannot be said that the extension to non-citizens of a statutory privilege granted only to citizens is judicial legislation, for clearly it is the federal constitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, non-citizens of the state shall likewise be "entitled" to them. The case of Spraigue v. Thompson, 118 U. S. 90, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception and thereby make the statute effective as to a class which the legislature did not have in mind, has application only to that class of cases where it is attempted
65 by the state to put a burden upon non-residents. That case has no application to the extension to non-residents of a privilege granted to residents and apparently has never been applied to the latter situation.

The very recent case of Travis v. Yale & Towne Mfg. Co., 40 Sup. Ct. Rep. 228, is relied upon in support of the contention that Estate of Johnson, supra, has been overruled by the Supreme Court of the United States. At first blush this case would seem to weaken the ruling of this court in Estate of Johnson. However, upon a close analysis of the Travis case, it will be found that it in no wise affects the doctrine of Estate of Johnson. The facts of the former case, substantially stated, were that the state of New York had imposed an income tax upon residents and non-residents but granted an exemption to residents of the state on the first one thousand dollars of their incomes, and further provided that every "withholding agent" (including employers) should deduct and withhold 2 per centum from all salaries, wages, etc., payable to non-residents, where the amount paid to any individual equalled or exceeded $1,000.00 in a year, and should pay the tax to the state comptroller. The court held, in affirmance of the judgment of the District Court of New York made in the first instance, that in granting to residents exemptions denied to non-residents the statute violated the provisions of section 2 of Article IV of the federal constitution, but a careful reading of the decision in that case reveals the fact that the court did not hold that the entire statutory scheme involved in that case was altogether void and nugatory. That is to say, the court did not declare that the statute was invalid in so far as it related to the imposition of a tax which, when freed and cleared of the attempted unwarranted discriminations operated uniformly upon resi-
66 dents and non-residents alike. True it is the court did not, in holding the attempted discrimination unwarranted, declare in terms that the exemptions granted to residents should by the conjunctive operation of the state statute and the fundamental law of the land be extended to non-residents, but in this behalf it is important to note that neither did the court decide that the statute was wholly invalid, that is to say, that residents and non-residents entirely escaped the burden of taxation because of the attempted discrimination. That it was not the purpose of the court to so declare is manifest, we think, by the decree rendered in the first instance by

the United States District Court of New York and affirmed by the Supreme Court of the United States.

That decree, although not set out in the opinion of the Supreme Court, is before us by the courtesy and consent of counsel for the respective parties in the instant case and may therefore, we take it, be rightly referred to in aid of the ascertainment of the scope and effect of the opinion of the Supreme Court. The decree mentioned does not, as counsel for the petitioner here contend, enjoin the state of New York from in any way collecting all or any part of the tax in question from non-residents. While it does enjoin the collection of the state tax from the complainants who were the "withholding agents" and the source of the income upon which the tax was levied, nevertheless it does not purport to enjoin the collection of the tax, with the discriminations eliminated, directly from resident and non-resident tax-payers. In short, the decree and its affirmance indicate that the court intended to do no more than declare that the discrimination in the granting of exemptions to residents and denying them to non-residents was, in the language of the supreme court itself, "an unwarranted *denial* to the citizens of Connecticut
67 and New Jersey of the privileges and immunities enjoyed by the citizens of New York." (Italics ours.) In other words, it was the denial to residents of other states of exemptions provided in the statute for residents of the state of New York which was declared to be invalidated by the provision of the federal constitution. Inasmuch as the court did not strike down the exemptions in so far as they applied to residents, it follows by necessary implication that, if the exemptions could not be denied to non-residents and were still extant as to residents, they must be available to non-residents. This conclusion is confirmed by a perusal of the opinion rendered in the first instance by the District Court, where it was carefully said that: "Nothing herein * * * is meant to be decided as to the validity of the statute so far as it relates to residents of the state of New York." (262 Fed. 576.) This can mean but one thing and that is that the act was valid as to residents and binding to the same extent, and only to the same extent, upon non-resident citizens of other states. While the opinion of the District Court cannot, of course, control the interpretation to be put upon the opinion of the Supreme Court, nevertheless it is illuminating and persuasive when considered in conjunction with the unqualified affirmance by the court of last resort of the decree of the lower court, despite the limitations which the latter Court explicitly put upon its judgment.

In any event, it cannot be said from anything contained either expressly or impliedly in the Travis decision that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the state of New York.

Therefore it seems that the Travis case in no way contravenes
68 the rule and the reason for the rule enunciated in Estate of Johnson, supra, and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimina-

tion, the statute iteelf is valid and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.

LENNON, *J.*

We concur:
LAWLOR, *J.*
SLOANE, *J.*

69 S. F. No. 9090.

QUONG HAM WAH COMPANY

vs.

INDUSTRIAL ACCIDENT COMM.

Concurring Opinion.

I concur. I agree for the most part with the main opinion, but I am not in accord with its discussion of Estabrook Company v. Industrial Accident Commission, 177 Cal. 767, and I would prefer to state as briefly as possible my own views for concurring in the result reached.

The law under discussion extends the benefits of the Workmen's Compensation Act to citizens of this state, but not to others, who are injured abroad in the course of their employment, when the employment was originated by contract within the state. The general questions are as to the power of the state to pass such a statute, and, if its power is limited, the exact effect of the limitation upon the statute. These general questions resolve themselves into a series of more particular questions.

First. Has the state any power whatever to prescribe the incidents of the relation of employer and employee when the employment, that is, the actual rendition of services by the employee, is without the state? If the state has no such power, then the present law is wholly void. That a state has no power to prescribe what the law of another sovereignty shall be is of course plain. In this sense, and the true sense, a state can give no extra-territorial effect to its laws whatever. But the present law does not attempt to do this. What it attempts to do is to prescribe what shall be the incidents
70 within this state and according to its own law of a relation existing without its boundaries. So far as I know, an independent sovereign state has the power to prescribe what incidents it pleases shall attach within its own boundaries to any relation or to any set of facts or happenings, whether existing or occurring within or without its own boundaries. This is nothing more than saying that it has the power to determine what shall be the law within its boundaries. As to this, there is no one to say it nay as a matter of legal right. There is a decided practical limitation, that of the comity of nations, but this is not a limitation imposed by the superior law and binding upon the state, but is only a limitation by way of policy which the state may or may not observe.

The present law therefore does not transcend the power inherent in a wholly independent sovereign, and if the state of California has no right to prescribe what shall be the incidents within its borders of an employment abroad, it must be because of some limitation upon its sovereignty. The only limitations of this character are those imposed by the Federal Constitution upon it, as a constituent member of the Union, and, so far as I know, there is no general limitation in the Federal Constitution upon the power of a state to prescribe the incidents which shall attach within its boundaries and by its own laws to happenings or events occurring elsewhere. I conclude therefore that the state had the power to pass the law in question subject only to such special limitations as the Federal Constitution may contain.

Second. Is the law in conflict with any special limitation of the Federal Constitution? The only limitation of the Federal Constitution which it is claimed the law transcends is that which provides that a citizen of one state shall be entitled to have within
71 another state all the rights and privileges of citizens of the latter. Putting it in a negative way, this constitutional provision means that no state shall discriminate in favor of its own citizens as against those of other states. By the present law our state extends the benefits of its Workmen's Compensation Act to employees who are its own citizens and are injured abroad in an employment originating here, but not to the citizens of other states injured under similar circumstances. It is apparent at once that there is present just the discrimination which the Federal Constitution seeks to prevent, unless:

1. There is valid reason for making in this case a distinction between citizens of this state and those of other states, or

2. The state was without power to pass such a law effective as to citizens of other states.

As to the first of these alternatives, the only reason advanced to justify the distinction is that it is only in the case of injuries to citizens that they or their families are likely to become public charges. There might be some ground possibly for this contention if the primary object of the law were to prevent injured employees or their families from becoming public charges. But this is not its purpose except in a very remote degree, and since it is not, the argument entirely fails.

As to the second alternative, it seems to me clear enough from what has already been said that the state has the power to prescribe what shall be the incidents within its own borders and according to its own laws as to every one within it, citizens or non-citizens, of the relation of employer and employee, whether that relation be engaged in abroad or not. Certainly our attention has been called to
72 no provision of the Federal Constitution to the contrary, and in the absence of such provision I can see no reason why the inherent sovereign power of the state to make what laws it chooses respecting the rights and obligations of those within its jurisdiction

should be limited in this particular. The necessary conclusion, or rather the statement in a slightly different way of what has already been said, is that since so far as the objects of the act are concerned there is no reason for making a difference between citizens and non-citizens, and since it was within the power of the state to make the law apply to the latter as well as to the former, the act purports to make a discrimination which is not permitted by the Federal Constitution. This leads to the third question, which is:

Third. What under these circumstances is the effect of the provision of the constitution upon the act; Does it destroy it so that neither citizen nor non-citizen shall have its benefits, or does it operate to extend the benefits to non-citizens so that they as well as citizens are "entitled" to its privileges, and the unlawful discrimination is thus removed? Upon this point I agree thoroughly with both the discussion and the conclusion of the main opinion, and with the Estate of Johnson, 139 Cal. 531, to which it refers and upon which it relies. The constitutional provision is couched in the affirmative, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." When a state endeavors to place a burden upon non-citizens but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to confer upon its citizens privileges or benefits not conferred on
73 others, the effect is just the opposite. The citizens of other states become "entitled" to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the Federal Constitution, which declares in so many words that they shall be so entitled. The constitutional provision, in other words, is a declaration that whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and be enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employees, both citizens of this state and those of other states, are entitled to the benefits of the act.

Fourth. In the answer just given to the third question lies, it seems to me, the true explanation of such decisions as those of Estabrook v. Industrial Accident Commission, supra. It is there said that an employer may not question the validity of such a law as the present because he does not come within the class discriminated against, towit, non-citizen employees. Now it cannot, in the very nature of things, be true that when it is attempted to charge a man, an employer for example, with liability under an invalid statute, a statute void because unconstitutional, he cannot question the validity of the statute upon which his liability depends simply because he is not one of the class discriminated against. If the law is a nullity and void, he of necessity is not liable and is entitled in all reason so to claim and show. If there are decisions to the contrary, nothing can be said of them except that they are fundamentally wrong. But the point in such instances as the Estabrook case is that the statute is

74 not void. It is perfectly valid. It is true it contravenes the Federal Constitution in attempting to withhold its benefits from non-citizens. But it is its attempt to withhold, not to confer, that alone contravenes the constitution and is herefore invalid and ineffective. The law stand as a valid enactment as to citizens, and the constitution operates to destroy its attempt to withhold its benefits from non-citizens and to extend those benefits to them. This being the true operation of the constitution upon the law which attempts to contravene it, it is plain that it is properly said in such a case that one not a member of the class discriminated against may not raise the question of constitutionality. It does not affect his liability in the slightest if the law is unconstitutional in the respect claimed, for the effect of the unconstitutionality is not to destroy the law but to extend it. As to him, the constitutional question is purely moot.

The recent decision of the Supreme Court of the United States in Travis v. Yale & Towne Co., referred to in the main opinion, is an exceedingly good illuseration of this. New York passed an income tax law allowing certain exemptions as to citizens, not allowed to others. Plainly, no citizen of New York could complain of this discrimination, because it was in his favor. The law was valid as to him. It was invalid as to non-citizens only, and as to them only to the extent of the discrimination. This much and nothing more was held in that case, and to this the decree was carefully limited, as the main opinion shows.

OLNEY, *J.*

75 *Concurring Opinion.*

I concur on the ground that the statute merely confers upon employees residing in this state the privilege of resorting to the Workmen's Compensation Act of this state to obtain compensation for injuries received while in the course of their employment, in all cases where the contract of employment was made in this state, whether the injury was received within or without this state, and that the provision of the constitution of the United States, ipso facto, carries this privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect. It must be observed that the statute does not purport to withhold this privilege from citizens of other states; it is merely silent with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But as it does not, the result is that the federal constitution prevents the statute from having the effect of withholding the privilege to citizens of other states. (Estate of Johnson, 139 Cal. 532.)

To the objection that the statute in effect withholds the privilege from persons who are neither citizens of any state nor residents of this state, the answer is that no provision of the federal or state constitution contains any limitation upon the power of the state legislature to make such discrimination, and that, unless it is so limited,

the power is plenary. (Const. Art. IV, sec. 1; Mitchell v. Winnek, 117 Cal. 525; Sheehan v. Scott, 145 Cal. 686; Mendenhall v. Gray, 167 Cal. 236.)

I am also satisfied that it is within the legislative power of the state, by appropriate laws, to attach to any personal relation created in this state, such as that of employer and employee, or master and servant, liabilities upon one party to such relation to the other, and
76 corresponding rights relating thereto, in addition to the mutual liabilities and rights arising from such relation at common law. The provision of the Workmen's Compensation Law extending its benefits to employees injured outside of this state where the contract of hire is made in this state, merely attaches to the relation created by such contract rights and liabilities additional to those arising under the common law, and it is therefore valid. This was decided by this court in Western Indemnity Co. v. Pillsbury, 170 Cal. 698-9, and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 415.

I agree with the conclusion that the petitioner has the right to attack the validity of section 58 of the act.

These propositions are in my opinion decisive of the case. Upon other matters stated in the opinion of Mr. Justice Lennon in his argument upon these questions I prefer to express no opinion.

SHAW, *J.*

I concur:

ANGELLOTTI, *C. J.*

77 *Concurring Opinion.*

I adhere to the views expressed in Estabrook Co. v. Industrial Accident Commission, 177 Cal. 767. I do not therefore agree with that portion of the opinion of Mr. Justice Lenon discussing that case, and the rule of law which it announces. I concur with what is said by Mr. Justice Lennon in reference to the jurisdiction of the State of California. I concur in that portion of his opinion in which he bases the constitutionality of the statute upon the principle announced in Estate of Johnson, supra. I agree with the majority of the court in holding that notwithstanding the language of the statute with reference to residents, by virtue of the federal constitution a nonresident of California, if a citizen of the United States, is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California and would also have jurisdiction of a similar complaint by a nonresident, and that there is therefore no such discrimination as is prohibited by the federal constitution.

WILBUR, *J.*

78 & 79

Copy.

In the Supreme Court of the State of California.

Bank.

San Francisco, No. 9090.

QUONG HAM WAH COMPANY, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION, etc., et al. and OWE MING and ALASKA PACKERS ASSOCIATION (a Corp.), Respondents.

On Review from the Industrial Accident Commission of the State of California.

The above entitled matter having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged and decreed by the Court that the Award of the Industrial Accident Commission of the State of California be, and the same is hereby affirmed.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above cause on the 5th day of October, 1920, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 5th day of November, A. D. 1920.

[SEAL.]

B. GRANT TAYLOR,
Clerk.

By HARRIET P. TYLER,
Deputy.

80 In the Supreme Court of the State of California.

S. F., No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting Said Commission, Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Petition for Writ of Error and for Order Fixing Supersedeas Bond.

To the Honorable Frank M. Angellotti, Chief Justice of the Supreme Court of the State of California:

Quong Ham Wah Company, your petitioner and plaintiff in error, respectfully shows as follows:

I.

That on or about October 5, 1920, said Court rendered an opinion herein, in which opinion the Court affirmed an order which had theretofore been made by the Industrial Accident Commission of the State of California awarding compensation for personal injuries pursuant to Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917 of said State. (Stats. 1917.)

II.

That thereafter, at the expiration of thirty days from said October 5, 1920, said Court rendered judgment in accordance with said opinion, and said judgment thereupon became final.

III.

81 That said final judgment in said matter was and is rendered in the highest Court of said State of California in which a decision in said suit could be drawn.

IV.

That in said judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of your petitioner, all of which will more in detail appear from the Assignment of Errors which is filed with this petition and made a part hereof.

V.

That as appears in the records and in the proceedings in said Court, there was drawn in question in said suit the validity of a

statute of the State of California, to-wit, Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917, and an authority exercised under said statute, on the ground that they violated Section 2 of Article IV of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the decision of said Court in said suit was in favor of the validity of said statute and of the authority so exercised.

VI.

That as further appears in the said records and proceedings, certain rights, privileges and immunities were claimed by your petitioner under Section 2 of Article IV of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the decision of said Court was against the rights, privileges and immunities so claimed.

Wherefore, your petitioner and plaintiff in error prays that a writ of error be allowed, returnable into the Supreme Court of the United States of America, and for the issuance of a citation to the above-named defendants in error, and that a transcript of the record, proceedings and papers upon which said judgment was rendered,
82 duly authenticated, be sent to the Supreme Court of the United States in compliance with the rules of said Court in such cases made and provided, and that, upon the giving of a bond in an amount to be determined by this Court, all further proceedings upon said judgment and award be stayed until the determination of this cause by said Supreme Court of the United States.

And your petitioner will ever pray.

WARREN GREGORY,
DELGER TROWBRIDGE,
Attorneys for Plaintiff in Error.

Presented to and received by me this 6th day of November, 1920.

P. M. ANGELLOTTI,
Chief Justice.

83 [Endorsed:] Original. S. F. No. 9990. Supreme Court of the State of California. Quong Ham Wah Company, Petitioner and Plaintiff in Error, vs. Industrial Accident Commission of the State of California et al., Defendants in Error. Petition for Writ of Error and for Order Fixing Supersedeas Bond. Filed Nov. 8, 1920, B. Grant Taylor, Clerk, By M., Deputy. Delger Trowbridge, Warren Gregory, Attorneys for Plff. in Error, Merchants Exchange Bldg., San Francisco, Cal.

84 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Assignment of Errors.

Now comes Quong Ham Wah Company, petitioner and plaintiff in error in the above-entitled cause, and complains of errors in the proceedings in the Supreme Court of the State of California in said cause and in the opinion and judgment rendered, made and entered therein in the above-entitled Court on the 4th day of November, 1920, and assigns the following as the errors complained of:

First. The Supreme Court of the State of California erred in its opinion in said cause, and in the judgment rendered therein, affirming the award of the Industrial Accident Commission of the State of California.

Second. Said Court erred in holding that Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917 of California was valid.

Third. Said Court erred in holding that although Section 58 of the said Workmen's Compensation, Insurance and Safety Act of 1917 discriminated between residents of different states and between citizens of different states, nevertheless it was valid.

Fourth. Said Court erred in holding that Section 58 of
85 the said Workmen's Compensation, Insurance and Safety Act of 1917 was valid and not violative of Section 2 of Article IV of the Constitution of the United States.

Fifth. Said Court erred in holding that Section 58 of the said Workmen's Compensation, Insurance and Safety Act of 1917 was not repugnant to the Fourteenth Amendment to the Constitution of the United States.

Sixth. Said Court erred in holding that Section 2 of Article IV of the Constitution of the United States, although contravened by Section 58 of the said Workmen's Compensation, Insurance and Safety Act of 1917, did not have the effect of rendering invalid that portion of said Section 58 of said Act providing for an extension of its benefits to residents and citizens of the State of California, and not to residents or citizens of other sister States.

Seventh. Said Court erred in holding that the privileges and benefits given to residents and citizens of the State of California by Section 58 of the said Workmen's Compensation, Insurance and Safety Act of 1917 are also given to residents and citizens of other States, although said Section 58 is silent as to non-residents and the citizens of sister states.

For which errors said Quong Ham Wah Company, petitioner and plaintiff in error herein, prays that the judgment of said Court be reversed and a judgment be entered for said petitioner and plaintiff in error, and for costs.

WARREN GREGORY,
DELGER TROWBRIDGE,
Attorneys for Plaintiff in Error.

Presented to me and received by me this 6th day of November, 1920.

F. M. ANGELLOTTI,
Chief Justice.

86 [Endorsed:] Original. S. F. No. 9090. Supreme Court of the State of California. Quong Ham Wah Company, Petitioner and Plaintiff in Error, vs. Industrial Accident Commission of the State of California et al., Defandants in Error. Assignment of Errors. Filed Nov. 8, 1920, B. Grant Taylor, Clerk, By M. Deputy. Delger Trowbridge, Warren Gregory, Attorneys for Pltff. in Error, Merchants Exchange Bldg., San Francisco, Cal.

87 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Order Allowing Writ of Error and Fixing Supersedeas and Cost Bond.

Upon the filing of the petition of the above-named Quong Ham Wah Company for a writ of error, together with Assignment of Errors, and upon motion of counsel for plaintiff in error:

It is ordered that a writ of error, as prayed for in said petition, be, and it is hereby, allowed to said Quong Ham Wah Company to have reviewed by the Supreme Court of the United States the judgment heretofore entered in the above-entitled cause.

It is further ordered that the amount of the bond to be filed in

this Court by said plaintiff in error in connection with the writ of error prayed for be, and is hereby, fixed in the sum of One Thousand (1000) dollars, and that upon the filing and approval of said bond in said amount, all further proceedings in said cause in said Supreme Court of the State of California, and in and before the Industrial Accident Commission of the State of California, shall be suspended and stayed until the determination of such writ of error by the Supreme Court of the United States.

Dated November 6th, 1920.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

88 [Endorsed:] S. F. No. 9090. Supreme Court of the State of California. Quong Ham Wah Company, petitioner and plaintiff in error, vs. Industrial Accident Commission of the State of California, et al., defendants in error. Order allowing writ of error and fixing supersedeas and cost bond. Filed Nov. 8, 1920. B. Grant Taylor, clerk, by M., Deputy. Delgar Trowbridge, Warren Gregory, Attorneys for Pltff. in Error, Merchants Exchange Bldg., San Francisco, Cal.

89 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission, Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Bond on Writ of Error and Staying Execution.

Know all men by these presents:

That we, Quong Ham Wah Company, as principal, and William Timson, whose address is 1050 Green Street, San Francisco, California, and A. K. Tichenor, whose address is 1717 Dayton Street, Alameda, California, as sureties, are held and firmly bound unto the defendants in error above-named, in the sum of One Thousand (1,000) Dollars, to be paid unto the said defendants in error or their successors and assigns, for the payment of which sum, well and truly to be made, we bind ourselves and each of us, our and each of our respective heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of November, 1920.

Whereas, Quong Ham Wah Company, plaintiff in error above-named, has sued out a writ of error to the Supreme Court of the

United States of America to reverse the judgment in the above-entitled cause rendered by the Supreme Court of the State of
90 California; and

Whereas, said plaintiff in error desires during the prosecution of such writ, to stay the execution of said judgment of the Supreme Court of the State of California:

Now, therefore, the condition of this obligation is such that if Quong Ham Wah Company, plaintiff in error above named, shall prosecute said writ of error to effect, and pay all costs and damages which may be awarded against it as such plaintiff in error if it fail to make good its plea, and shall abide by and perform whatever order or decree may be rendered against it in this cause by the Supreme Court of the United States of America, or on the mandate of said court by the said Supreme Court of the State of California, then this obligation to be void; otherwise to be and remain in full force and effect.

QUONG HAM WAH COMPANY,
By LEM SEN,
Manager (As Principal).
WILLIAM TIMSON, [SEAL.]
A. K. TICHENOR, [SEAL.]
(As Sureties.)

91 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Wm. Timson, one of the sureties whose names are subscribed to the above undertaking, being duly sworn says that he is a resident and householder in the said City and County of San Francisco, State of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

WILLIAM TIMSON.

Subscribed and sworn to before me this 6th day of November, 1920.

[Notarial Seal.] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 7, 1922.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. K. Tichenor, one of the sureties whose names are subscribed to the above undertaking, being duly sworn says that he is a resident and householder in the City of Alameda, County of Alameda, State of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. K. TICHENOR.

Subscribed and sworn to before me this 6th day of November, 1920.

[Notarial Seal.] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 7, 1922.

The foregoing bond is hereby allowed and approved this 6th day of November, 1920, and the same may operate as a cost bond and a stay of execution in said cause pending the prosecution of said writ of error.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

92 [Endorsed:] S. F. No. 9090. Supreme Court of the State of California. Quong Ham Wah Company, petitioner and plaintiff in error, vs. Industrial Accident Commission of the State of California et al., defendants in error. Bond on writ of error and staying execution. Filed Nov. 8, 1920. B. Grant Taylor, clerk, by M., Deputy. Delger Trowbridge, Warren Gregory, Attorneys for Pltff. in Error, Merchants Exchange Bldg., San Francisco, Cal.

93 In the Supreme Court of the United States of America.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission; Owe Ming, and Alaska Packers Association, a Corporation, Defendantts in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in that certain matter of the petition of Quong Ham Wah Company, one of the respondents, for writ of review against the Industrial Accident Commission of the State of California, and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission, Owe Ming, and Alaska Packers Asso-

ciation, a corporation, San Francisco Number 9090 in the records of said Court, wherein was drawn in question the validity of a statute or an authority exercised under said statute, to-wit, a statute of the State of California, on the ground of its being repugnant to the constitution and laws of the United States, and the de-
94 cision was in favor of its validity, a manifest error hath happened to the great damage of the said respondent, Quong Ham Wah Company, as by its complaint appears, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be given therein, that, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the 5th day of January, 1921, in the said Supreme Court of the United States to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 6th day of November, 1920.

Done in the City and County of San Francisco, State of California, with the seal of the Southern Division of the District Court of the United States for the Northern District of California attached.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the Southern Division of the United States District Court in and for the Northern District of California,
By J. A. SCHAERTZER,
Deputy Clerk.

Allowed this 6th day of November, 1920.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

95 [Endorsed:] Original. In the Supreme Court of the United States of America. Quong Ham Wah Company, petitioner and plaintiff in error, vs. Industrial Accident Commission of the State of California et al., defendants in error. Writ of Error. Filed Nov. 8, 1920. B. Grant Taylor, clerk, by M., deputy. Delger Trowbridge, Warren Gregory, attorneys for pliff. in error, Merchants Exchange Bldg., San Francisco, Cal.

96 In the Supreme Court of the State of California.

S. F. No. 9090.

QUONG HAM WAH COMPANY, Petitioner and Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as Members of and Constituting said Commission; Owe Ming, and Alaska Packers Association, a Corporation, Defendants in Error.

Citation.

The President of the United States of America to the Industrial Accident Commission of the State of California and A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission; Owe Ming, and Alaska Packers Association, a corporation, defendants in error in the above-entitled cause:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, on the 5th day of January, 1921, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of California, wherein Quong Ham Wah Company is plaintiff in error, and you and each of you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the Chief Justice of the Supreme Court of the State of California, this 6th day of November, 1920.

F. M. ANGELLOTTI,
Chief Justice.

Attest:

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.
By W. R. MACKRILLE,
Chief Deputy.

Due service and receipt of a copy of the within Citation and receipt of copy of Writ of Error and Order allowing Writ of Error mentioned therein admitted this 8th day of November, 1920.

A. E. GRAUPNER,
WARREN H. PILLSBURY,
Attorneys for Defendants in Error Industrial Accident Commission of the State of California and the Members Thereof.
JOHN L. McNAB,
BYRON COLEMAN,
Attorneys for Defendant in Error Owe Ming.
CHICKERING & GREGORY,
Attorneys for Defendant in Error Alaska Packers Association, a Corp.

97 [Endorsed: Original. S. F. No. 9090. Supreme Court of the State of California. Quong Ham Wah Company, petitioner and plaintiff in error, vs. Industrial Accident Commission of the State of California et al., defendants in error. Citation. Filed Nov. 8, 1920. B. Grant Taylor, clerk, by M., deputy. Delger Trowbridge, Warren Gregory, attorneys for pltff. in error, Merchants Exchange Bldg., San Francisco, Cal.

98 STATE OF CALIFORNIA, *ss:*

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, hereby certify that the foregoing transcript constitutes a full, true and correct copy of the proceedings had and orders entered in the above-entitled cause as set forth therein, as the same appear on file and of record in this office, with the exception of the Petition for a Writ of Error, the Assignment of Errors, the Writ of Error, and the Citation, which documents are herewith attached and which are the original Petition for a Writ of Error, original Assignments, original Writ, and original Citation.

The foregoing constitutes the entire transcript in the cause.

Witness my hand and the official seal of said Court, the 17th day of November, A. D. 1920.

[Seal of Supreme Court of California.]

B. GRANT TAYLOR,
Clerk,
By I. ERB,
Deputy,

Endorsed on cover: File No. 27,995. California Supreme Court. Term No. 638. Quong Ham Wah Company, plaintiff in error, vs. Industrial Accident Commission of the State of California et al. Filed December 6th, 1920. File No. 27,995.

FILED

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

QUONG HAM WAH COMPANY,
Plaintiff in Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and A. J. PILLSBURY, WILL J. FRENCH and MEYER LISSNER, as members of and constituting said Commission, OWE MING, and ALASKA PACKERS ASSOCIATION, a corporation,
Defendants in Error.

MOTION FOR ADVANCEMENT OF CAUSE.

Now come plaintiff in error and defendant in error Industrial Accident Commission of the State of California, and respectfully move this Honorable Court for the advancement of this cause for early presentation and decision. This motion is made for the reason that this cause involves important questions of constitutional law affecting a large number of persons outside of the parties to the present case, and affecting the public interest.

BRIEF STATEMENT OF THE MATTER INVOLVED.

Section 58 of the California Workmen's Compensation, Insurance and Safety Act of 1917 (chapter 586 California Laws 1917) reads as follows:

> "Sec. 58. The Commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The constitutionality of this section was attacked below and is here attacked by plaintiff in error upon the ground that it contains an unwarranted discrimination between resident and nonresident employees of California injured outside of California. It is asserted by plaintiff in error that such alleged discrimination between residents of California and nonresidents of California renders this section offensive to article IV, section 2 of the Constitution of the United States, securing to the citizens of each state the privileges and immunities of the citizens of the several states, and also to the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the states from denying to any person within their jurisdiction, the equal protection of the laws. If the contentions of plaintiff in error be sustained by this court, the effect will be to divest the Workmen's Compensation Act of

California of all extraterritorial force. The Supreme Court of California has ruled, in the case of *North Alaska Salmon Company* vs. *Industrial Accident Commission et al*, 174 Cal. 1, 162 Pac. 93, that said act cannot have extraterritorial application except by specific statutory provision, and there is no statutory provision having this effect other than section 58 of the Compensation Act, above.

REASONS FOR MAKING THIS APPLICATION.

As this motion is presented jointly by plaintiff in error and one of the defendants in error, we will endeavor to illustrate the importance of the question presented from the point of view of each side.

I.

The decision in this case will determine the rights of traveling salesmen and other traveling employees hired in California whose work carries them transiently outside the state of their residence. If section 58 be held invalid, a resident employee, frequently employed by an employer who is also resident in California, would be under the difficulty of having to maintain his action under the law of some foreign state with which he was not familiar and which was not within the contemplation of the parties at the time of the creation of the contract of hire. If the law of such foreign state be a Workmen's Compensation Act enforceable only through a board or commission, both parties would either face procedural

difficulties involving the jurisdiction of the courts of their own state to enforce the foreign statute or would have to go to such foreign state for the purpose of litigation.

As to the employer, the question is presented as to how he can protect himself against liability under the laws of all states in which his employees may be found transiently upon business, or whether he can defend or insure his liability under the laws of the state of his residence and principal place of business.

II.

A similar situation presented under section 58 exists where contracting concerns recruit their labor force in California for a particular construction job to be performed outside the state, returning the men to California at the close of their work.

III.

The present case deals particularly with the Alaska fisheries problem. Laborers are recruited each spring in the Pacific coast states to work in the Alaska fisheries during the open season, who are returned to the state of origin at the close of the season's work, both employers and employees being mainly resident in the Pacific coast states and not in Alaska.

The question, as viewed by plaintiff in error, is whether its liability is to be determined by the law of the territory in which the work is carried on and

the injury is received, or the law of the state of residence of the parties and the making of the contract of hire.

As to the workmen, the question is presented of whether they can claim workmen's compensation benefits under the law of the state of their residence and hiring, or must look to the law of Alaska.

As to the State of California, the question is presented of whether California can protect itself against its citizens and residents taken hence for transient labor and returned here in a disabled condition, or being killed abroad, leaving dependents within the state, in either of which cases local charitable aid, public or private, may be necessary.

As to the Territory of Alaska and states other than California in which an employee who was hired in California may be injured, the question is presented as to how far the respective industrial commissions of such territory or state should take jurisdiction over the matter and thus protect their own citizens against disabled dependents.

Without regard to the merits of the respective contentions, the uncertainty itself is detrimental to all parties concerned. An employer cannot ascertain with assurance, until the decision of this case, what law fixes his obligation. Similarly, an employee cannot determine with assurance, in which forum to bring his proceeding, nor can insurance carriers insuring liability under the workmen's compensation

act of the state, determine with assurance what premiums to collect in such cases.

Another reason why early decision is requested is that the California Legislature will hold its next biennial session next spring and will normally not meet again until 1923. If amendment of the statutory provision in question should be necessitated by the decision of this court, it is quite important that this fact be known if possible before the coming session of the Legislature adjourns.

We therefore respectfully request that this cause be advanced to early hearing.

Respectfully submitted.

WARREN GREGORY,
DELGER TROWBRIDGE,
Counsel for Plaintiff in Error
Quong Ham Wah Company.
WARREN H. PILLSBURY,
Counsel for Defendant in Error
Industrial Accident Commission
of the State of California.

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 638

QUONG HAN WAH COMPANY,
Plaintiff in Error,
vs.
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and E. J. PRIBBURY, WILL J. FRENCH and MEYER LEVITAN, as members of and constituting said Commission, OWE MING, and ALASKA PACKERS ASSOCIATION (a corporation),
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WARREN GREGORY,
ALLEN L. CHICKERING,
DELOSS THOMPSON,
Attorneys for Plaintiff in Error.

Table of Contents.

Table of Authorities.

TEXTS CITED.

In the Supreme Court
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BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Alaska Packers Association, one of the defendants in error, is a California corporation which owns and operates salmon canneries in the Terri-

tory of Alaska and the State of Washington. In the spring of each year it hires large numbers of employees in California to work in these canneries. The contracts of employment are generally made between a contractor and the employee; and in the present case Quong Ham Wah Company was the contractor and Owe Ming the employee. These contracts are signed in California and the employees sail from the port of San Francisco to their destination. There they remain working at the canneries for about six months and return in the late fall to San Francisco, where they are paid off and the relationship terminated. What is known as the inside work of the canneries is done, for the most part, by Orientals, Mexicans and Filipinos, many of whom are not domiciled in California, but who come to San Francisco for the purpose of signing their contracts of employment and embarking upon vessels sailing to the canneries.

Defendant in error, Owe Ming, a resident of California, was hired by the Quong Ham Wah Company in 1918 to work in a cannery of the said Association at Cook's Inlet, Alaska, as a machine tender. While engaged in that employment, and on July 30, 1918, he was injured; this injury, as the Industrial Accident Commission found, was the result of negligence on the part of the employee and was not caused by any negligence on the part of the employer or the Association (fols. 15-16). Upon his return to San Francisco, Owe Ming petitioned the said Industrial Accident Com-

mission for an order granting him compensation, and on March 10, 1919, the commission made an award decreeing that the Quong Ham Wah Company and the Alaska Packers' Association were liable to Owe Ming in the sum of $464.85. The findings are brief (fols. 13-17).

The Quong Ham Wah Company thereupon filed a petition with the Supreme Court of the State of California, asking that the said award be annulled upon the ground that the said commission was without jurisdiction to award compensation for injuries or death occurring outside the territorial limits of the State, except for the provisions of Section 58 of the Compensation Act of 1917, and that said Section 58 was void because it violated Article IV, Section 2, of the Constitution of the United States, in that it granted a privilege to citizens of the State of California which it denied to citizens of other States of the Union, and further, because said section violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denied to persons who are not residents of the State of California the equal protection of the laws with persons who are residents of said State; and further, that said Section 58 was violative of Article IV, Section 1, of the Constitution of the United States, in that it failed to give full faith and credit to the public acts, records and judicial proceedings of the other States in the Union, in this, that although Section 58 provides that residents in California injured in an-

other state of the Union may recover compensation for such injuries, nevertheless it is expressly provided in said Act that the right to compensation or death benefits existing under the terms of the Act shall be in lieu of any other liability whatsoever.

In common with many other of the States of the Union, the legislature of the State of California on May 26, 1913, enacted a Workmen's Compensation, Insurance and Safety Act, which became effective January 1, 1914 (Cal. Stats. 1913, p. 279).

In this original Act no specific provision was made for an accident which occurred without the State of California to an employee who was hired in California. In the case of *North Alaska Salmon Company v. Pillsbury*, 174 Cal. 1, the Supreme Court of California held that compensation for injuries received by an employee beyond the limits of the State was not under the jurisdiction of the commission and that the Act had no extraterritorial effect.

On June 3, 1915, the aforesaid statute was amended in many particulars (Stats. 1915, p. 1079). Section 75a of the amended Act provided (p. 1101):

> "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state

and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

In 1917 the legislature re-enacted the entire measure (Stats. 1917, p. 831), and carried forward Section 75a of the Act of 1915 verbatim to Section 58 of the new Act, so that at the time of the injury complained of in the instant case the section read in the precise form shown above.

The construction of this section came before the Supreme Court of California in the case of *Estabrook v. Industrial Accident Commission*, 177 Cal. 767, in which case it was held that the petitioner could not make the contention that the section of the Act in question was unconstitutional, because he was himself a resident of California and therefore not a member of the class discriminated against. No writ of error to this court was acted upon in this Estabrook case.

The Supreme Court of California have considered the instant case twice. In its first opinion rendered on December 26, 1919, (fols. 26-38), it was decided that the principle as established in the Estabrook case be overruled; that there were certain considerations which enabled a petitioner to raise his constitutional objections to the validity of the statute in question, although such petitioner was not himself a member of the class discriminated against; in other words, Quong Ham Wah Company, although a resident of the State

of California, could raise the point that the aforesaid Section 58 of the Act of 1917 was violative of the Constitution of the United States. Accordingly, the award in question was annulled; it being conceded that the statute manifestly attempted to create an unlawful discrimination between a resident and a nonresident of the State.

From this last judgment a rehearing was granted, and the final judgment of the court below was rendered on October 5, 1920. In this opinion for the first time there was thrown into the case the argument that, although there was by this statute granted a special privilege to a citizen of California, nevertheless by virtue of the provisions of the Federal Constitution that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" whatever privilege or immunity was granted to a citizen of the State was, by such constitutional provision, extended *ipso facto* to every noncitizen of the State.

In its final opinon rendered on October 5, 1920, and reported in 192 Pacific Reporter, page 1021 (fols. 48-77), the Supreme Court of the State considered carefully the various questions involved, and decided (1) that petitioner, although he was a resident of California, could attack the validity of the aforesaid Section 58 of the Workmen's Compensation Act; (2) that the jurisdiction of the Act had application only because the contract

was made in the State, but there was no inherent reason or basis of discrimination in favor of a resident as against a nonresident of the State; (3) that if the Act did in fact confine the jurisdiction of the commission to the settlement of a controversy arising out of an injury suffered without the State by an injured employee who was a resident of the state, then that the same violated Section 2 of Article IV of the Constitution of the United States, being a discrimination against a nonresident of the state; (4) that although the discrimination complained of would, in fact, necessitate the striking down of the section in question as being discriminatory against a nonresident of the State, nevertheless, in the absence of express language negativing its effect as against such nonresident, the said provisions of the Federal Constitution operated to extend *ex proprio vigore* whatever privilege was thereby granted to all citizens of the several States; (5) that therefore, although the California Act says in express terms that the commission shall have jurisdiction to award a claim for damages arising out of an injury suffered by an injured employee who is a resident of the State, nevertheless this right also accrues to one who is not a resident of the State, by virtue of the Federal Constitution, and whatever privileges and immunities are by this Act extended to a resident of California are also conferred upon a nonresident or noncitizen of California.

To uphold ths last contention the court relied wholly upon a prior decision of the Supreme Court of California (*Estate of Johnson*, 139 Cal. 532).

I.

Argument.

THE JUDGMENT OF THE COURT BELOW THAT PETITIONER, ALTHOUGH A RESIDENT OF CALIFORNIA, COULD NEVERTHELESS ATTACK THE VALIDITY OF THE STATUTE, IS CLEARLY CORRECT.

As noted above, the State Supreme Court in both opinions recognized the distinction between the instant case and those cases which have held that one who is not a member of the class discriminated against is not in a position to attack the law. We can add little to the convincing argument on this point contained in these opinions. In brief, it is there said that the principle enunciated in the Estabrook case does not apply because:

(1) There is a well-defined exception to the rule that no one not a member of the class alleged to be unlawfully discriminated against may raise the constitutional question. A nonresident of California could not raise the question of the constitutionality of the statute because he would have no standing before the commission, and if he applied to a court for relief and succeeded he would by such result have deprived himself of any relief. because the only judgment which the court could

render in such case would be that the section is unconstitutional and void in toto and no relief could be based thereon either to a resident or non-resident.

(2) The case falls directly within the ruling of this court in *Buchanan v. Warley*, 245 U. S. 60. It is not true that the interests of the petitioner, Quong Ham Wah, are not directly affected by the law in question. By the award he has been ordered to pay Owe Ming the sum of $464.85. If the statute is invalid he would owe Owe Ming nothing. Thus, to paraphrase the language of the court in *Buchanan v. Warley*, the obligation of the plaintiff in error to pay a debt was directly involved and, indeed, *created* by the statute alleged to be violative of constitutional rights. "In this case the property rights of the plaintiff in error are directly and necessarily involved".

(3) Any person may raise the question of unconstitutional class discrimination as showing lack of jurisdiction. In the two cases of *Heim v. McCall*, 239 U. S. 175, and *Crane v. People of the State of New York*, 239 U. S. 195, this court considered the constitutionality of a State statute which provided that preference in public work should be given to citizens of the State of New York, although the party seeking to have the constitutional provision declared unconstitutional was a property-owner and taxpayer of the State of New York.

It was said in *New York Life Ins. Co. v. Hardison*, 199 Mass. 190:

". . . It is a general rule that the court will not consider the constitutionality of a statute upon an objection made by persons whose rights are not affected by it, and usually the parties to the suit are the only ones who are permitted to raise such a question. But where, as in this case, the jurisdiction of the court depends entirely upon the validity of the act, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not interested in the case before the court, we deem it our duty to consider whether we have jurisdiction, before taking affirmative action. Action of a court that has no jurisdiction is void." Citing Belcher v. Sheehan, 171 Mass. 513.

II.

IF THE STATUTE GIVES A RIGHT TO A RESIDENT OF THE STATE OF CALIFORNIA WHICH IS NOT GIVEN TO A NONRESIDENT OF THAT STATE, THEN IT IS CLEARLY VIOLATIVE OF SECTION 2 OF ARTICLE IV OF THE FEDERAL CONSTITUTION AND ALSO OF SECTION 1 OF THE 14th AMENDMENT.

The distinction drawn between a resident and a nonresident is, as the court below said,

"capable of construction only as a distinction between citizens and noncitizens. The discrimination in the instant case is based directly upon citizenship, and, therefore, independently of the reasonableness of the classification, the statute is violative of the constitution."

No good ground has been urged for this attempted classification, and the careful reasoning

of the court below on the point is not only persuasive but it is as far as this court is concerned conclusive on this particular point.

The Industrial Accident Commission is by the Act given large functions of a *judicial* nature. The State of California could not limit the jurisdiction of this quasi-court to a citizen of that State, any more than it could provide that no one not a citizen of California could sue in its regular State courts. In *Ward v. Maryland*, 12 Wall. 418, this court, while expressly stating that no attempt would be made to define the words "privileges and immunities", did, nevertheless, lay down certain broad characteristics of those expressions as used in the Federal Constitution. It was there said:

> "* * * it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; *to maintain actions in the courts of the State;* and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." (Italics ours.)

In *Cole v. Cunningham*, 133 U. S. 107, this court said that "the right to institute actions" was one of the privileges and immunities which a State may not confine to its own citizens; and in *Blake v. McClung*, 172 U. S. 239:

> "For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people."

Nor is there in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, anything opposed to the above. It was there held that a statute of Ohio did not violate the Federal Constitution in providing that no action could be maintained in the courts of that State for a wrongful death occurring in another State, except where the deceased was a citizen of Ohio, since the restriction operated equally upon representatives of the deceased, whether they were citizens of Ohio or of other States. The right to sue and defend in the courts of a State by a noncitizen of that State was expressly recognized.

Section 58 of the Act in question affords relief only in cases where the injured employee is a resident of the State at the time of the injury. This, in effect, is the same thing as if the Superior Court of the State of California was given jurisdiction to decide the rights and obligations of a citizen of the State only. It shuts the door of the commission on anyone who is not a resident of the State at the time of the injury. The privilege thus denied is one which a State may not confine to its own citizens.

It was said by the court below:

> "The right of the legislature to enact reasonable regulations governing the creation of contractual liability is unquestioned. When, however, the legislature attempts to provide

that a substantial privilege shall be incident to certain contracts of employment when entered into in this state by citizens of this state and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our union, the enactment is clearly violative of section 2 of Article IV of the federal constitution. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other" (fol. 35).

The reasoning of the court and the authorities cited on this point require no further elaboration (fols. 35-38, 56-61, 71-72).

The highest court of the State held in this case that there exists no reasonable ground for a distinction to be drawn by the Legislative Act of California between a citizen or resident of California and a noncitizen or nonresident of that State. This conclusion is binding upon this court, since the particular question does not depend upon the Constitution, laws or treaties of the United States, or upon any principle of the commercial or mercantile law or of general jurisprudence. It was said by this court in *Hartford Ins. Co. v. Chicago etc. Railway,* 175 U. S. 91:

> "Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Con-

stitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court."

III.

SECTION 58 OF THE CALIFORNIA COMPENSATION ACT DOES NOT COVER THE CLAIM OF A NONRESIDENT OF THE STATE, BECAUSE (a) THE LANGUAGE OF THE ACT PLAINLY LIMITS IT TO INJURIES SUFFERED BY A RESIDENT OF THE STATE, AND (b) THE ENTIRE ACT HAS UNMISTAKABLE EVIDENCE THAT IT WAS NEVER INTENDED BY THE LEGISLATURE THAT THE OPERATION OF THE LAW SHOULD BE EXTENDED TO NONRESIDENTS.

The language of Section 58 of the Act in question is, for convenience, here repeated:

> "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state *in those cases where the injured employee is a resident of this state at the time of the injury* and the contract of hire was made in this state, and any *such* employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Italics here and elsewhere in this brief are ours.)

The conclusion of the court below necessarily results in the declaration that the seemingly all essential language italicized above may be quite eliminated from the section with the same result.

Although by the operation of the section of the Federal Constitution relied upon, statutes may in a limited class of cases be held not violative of a constitutional right, nevertheless it is plain that in extending to citizens of the several States the privileges and immunities granted to the citizens of a particular State the court can do no more than interpret the legislative intent. If the legislature has in unequivocal language expressed an intention to the contrary, then the statute cannot be saved by the court. The only question, therefore, is whether or not it is apparent from the language of the section that the legislature of California intended to limit the jurisdiction of the commission to the injuries of an employee who was a "*resident* of this State at the time of the injury". This is recognized in one of the concurring opinions of the court below, where it was said (fol. 75):

> "* * * * It must be observed that the statute does not purport to withhold this privilege from citizens of other States; it is merely silent, with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But, as it does not, the result is that the federal Constitution prevents the statute from having the effect of withholding the privilege to citizens of other States."

The language of the section used is as clear and unequivocal as if it had contained a parenthetical clause stating that the commission did *not* have

jurisdiction over a controversy where the injured employee was not a resident of the State. There must have been some substantial reason which caused the legislature to use the language above italicized, and this reason is, obviously, that it was intended that residence in the State at the time of the injury was a condition precedent to the jurisdiction of the commission.

If a statute gives a right or imposes an obligation upon a *colored* person it does not make to the clarity of the statute to add the words "This does not apply to a *white* person". If a law permits fishing in a public stream *above* a certain designated point, the irresistible inference is that the right is not granted *below* that point. *Enumeratio unius exclusio alterius.* When this right was given to an injured employee who "is a resident of this State at the time of the injury", it was *intentionally* withheld from an injured employee who was *not* a resident of the State at the time of the injury. It is not necessary when a right is granted to a particular person that there must in every case follow a denial of the right to others not so circumstanced.

These considerations apply with peculiar force to a statute such as this, which has imposed new obligations upon both employer and employee, and which is a departure from the rules of the common law governing this relationship, because it confers a right without a corresponding wrong. This novel

characteristic is recognized in all the cases where this or similar laws have been consdered.

Arizona Employers' Liability Cases, 250 U. S. 400;

Western Indemnity Co. v. Pillsbury, 170 Cal. 686;

Alabama G. S. R. Co. v. Carroll, 97 Ala. 126.

In the case last cited it is said:

> "The duties and liabilities incident to the relation between the plaintiff and the defendant which are involved in this case, are not imposed by and do not rest in or spring from the contract between the parties. The only office of the contract * * * is the establishment of a relation between them, that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation the statute imposes certain duties and liabilities on the parties to it wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations."

The rights, therefore, granted the injured employee herein were *created* by the statute and must be expressly limited by the terms of that statute. As already noted, the Supreme Court of California had decided (174 Cal. 1), that until this Section 58 was adopted an employee hired in California, but injured without that State, had no claim

to compensation at all through the Industrial Accident Commission. This claim was therefore peculiarily recognized as a *new* right which was created for the first time when this section was adopted.

The language of the section is so clear that it is not possible to extend its terms to nonresidents of the State without doing violence to well-recognized rules of statutory construction. To so extend it is to compel the legislature to create a right in favor of a class of persons which it had expressly intended to exclude.

It cannot be presumed that the legislature would have enacted the section at all if the rights thereby granted were extended to nonresidents. In *Spraigue v. Thompson,* 118 U. S. 90 (cited in Estate of Johnson), the same question was under consideration, and it was there said:

> "The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by Sec. 4237 Rev. Stat. It excepts from its operation 'coasters in this State', and 'between the ports of this State and those of South Carolina', and 'between the ports of this State and those of Florida'.
>
> It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional, may be rejected, and the remainder preserved and enforced. *But the insuperable difficulty with the application*

of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Sec. 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Sec. 4237 of the Revised Statutes." (Italics ours.)

In his concurring opinion in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, supra, Mr. Justice Holmes said:

> "Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law."

The decision of the Supreme Court of California, to the effect that "despite the invalidity of the discrimination, the statute itself is valid and may be made to apply uniformly to citizens of Califor-

nia and the citizens of the other States" amounts to judicial legislation upon a subject as to which the legislature had either failed or refused to legislate. The court has created a liability which the legislature did not and probably would not create, and it has extended the powers of the Industrial Accident Commission to a field which the legislature by express language refrained from entering upon.

If Section 58 as construed by the usual canons of statutory construction contains a discrimination against a nonresident, then the entire section must fall. The court cannot save it by in effect rewriting the statute. This it does when it eliminates entirely the language "where the injured employee is a resident of this State at the time of the injury". Such is not the expression of the legislative will. If any of its essential elements are in conflict with the Constitution, the court cannot strip it of these elements and leave the remaining portion valid.

> "The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the courts, to put it in force. The courts have no right thus to usurp the province of the legislature."
>
> *Meshmeier v. State*, 11 Ind. 482, 486.*

*See also:

Cooley's Const. Limitations, 7th Ed. pp. 246-248;
Warren v. Mayor and Aldermen of Charlestown, 2 Gray 85, 89, per Shaw, Chief Justice;
Central Branch U. P. R. Co. v. Atchison etc. Co., 28 Kans. 325, per Brewer, Justice;
Lathrop v. Wills, 19 Cal. 513, 530;
Slauson v. City of Racine, 13 Wis. 444, 450;
Commonwealth v. Hana, 81 N. E. 149.

Where a statute is silent as to a particular class, and by such silence a discrimination has developed, then the whole statute is void.

IV.

ALTHOUGH THE PROVISIONS OF THE FEDERAL CONSTITUTION MAY, IN CERTAIN CASES, EXTEND THE PRIVILEGES AND IMMUNITIES OF THE CITIZENS OF A PARTICULAR STATE TO THE CITIZENS OF THE SEVERAL STATES, NEVERTHELESS SUCH PRINCIPLE HAS NO APPLICATION IN THE INSTANT CASE, BECAUSE THERE IS THEREBY EXTENDED A BURDEN AS WELL AS A PRIVILEGE OR IMMUNITY.

The foregoing analysis of the case will show that the principle enunciated in the case of *Estate of Johnson*, 139 Cal. 532, is the controlling factor in the final decision of the case. We believe this principle to be a new one so far as this court is concerned, although its very recent decision in *Travis v. Yale & Towne Mfg. Co.*, 40 Sup. Ct. Rep. 228, is recognized by the court below (fol. 65) as having some bearing upon this question. The general principle has been adopted in other courts.*

Estate of Johnson is grounded upon a quotation contained in the opinion in the *Slaughterhouse Cases*, 16 Wall. 36, to the effect that:

> "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the States. * * * Nor did it profess to control

*Kunkel v. State, 170 N. W. Rep. 715; 33 L. R. A. (New Series), 599 and cases cited.

> the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Section 2 of Article IV extends the "privileges and immunities" of the citizens of one State to the citizens of the several States. It does not purport to extend the *obligations* imposed by one State upon its own citizens to the citizens of another State. This is an all-important distinction. Thus, an obligation for the payment of a poll-tax levied upon all adult persons domiciled within a State on a certain day would not, by virtue of this constitutional provision, extend to a nonresident of the State who happened to be within its boundaries on the day in question. The general and splendid intent of the section was to permit no discrimination in the laws of a State between its own citizens and those of another state. It could be invoked only when the citizens of one State had a distinct "privilege or immunity" which was not extended to the citizens of another State.

The right to secure compensation from the Industrial Accident Commission of California has been treated throughout all these opinions as a distinct "privilege or immunity", without recognition of the *obligation* attached thereto. This

passing on of a benefit is the basis of the entire doctrine. It was never intended to pass on a burden. Thus in *Estate of Johnson*, 139 Cal. 532, it was said (p. 538):

> "In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void. This is a most vital distinction, which is lost sight of in the Mahoney case."

In the instant case it is said in the opinion of the court (192 Pac. Rep. Adv. Sheets, 1027) (fols. 63-64):

> "For, where a state endeavors to place a *burden* upon noncitizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens *privileges* and *immunities* not accorded by the statute to citizens of other states, the federal Constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state, *in so far as*

concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens, and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen." (Italics ours.)

And again, it was said by Mr. Justice Olney (fol. 73):

"When a state endeavors to place a *burden* upon noncitizens, but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to confer upon its citizens *privileges* or *benefits* not conferred on others, the effect is just the opposite. The citizens of other states become 'entitled' to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal Constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that, whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employes, both citizens of this state and those of other states, are entitled to the benefits of the act."

This conclusion obviously proceeds upon the theory that the right to claim compensation from the Industrial Accident Commission is a *benefit* or a

privilege, and not a *burden.* Further, that the underlying principle of the whole doctrine is one of equality as between citizens and noncitizens of a State.

The Act in question was passed by the legislature pursuant to certain amendments made to the Constitution of the State, namely, Article XX, Section 17½, which provides:

> "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created, such power and authority as the legislature may deem requisite to carry out the provisions of this section."

And Article XX, Section 21, which provides:

> "The legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

Section 1 of the Act states its scope and intent as follows:

"This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the constitution of the State of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment, full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury, full provision for adequate insurance coverage against the liability to pay or furnish compensation, full provision for regulating such insurance coverage in all its aspects including the establishment and management of a state compensation insurance fund, *full provision for otherwise securing the payment of compensation, and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any matter* arising under this act to the end that the administration of this act shall accomplish substantial justice in all cases expeditiously, inexpensively and without incumbrance of any character; all of which matters contained in this section are expressly declared to be the social public policy of this state, binding upon all departments of the state government."

The Act binds the *employee* as well as the *employer*. Section 6 provides:

"Sec. 6. (a) Liability for the compensation provided by this act, *in lieu of any other liability whatsoever to any person,* shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and employee are subject to the compensation provisions of this act.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not caused by the intoxication of the injured employee, or is not intentionally self-inflicted.

Misconduct of Employee or Employer.

(4) Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable by him shall be reduced one-half; provided, however, that such misconduct of the employee shall not be a defense to the claim of the dependents of said employee, if the injury results in death, or to the claim of the employee, if the injury results in a permanent partial disability equaling or in excess of seventy per cent of total; and provided, further, that such misconduct of said employee shall not be a defense where his injury is caused by the failure

of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment; and provided, further, that in case of an injury suffered by an employee under sixteen years of age, it shall be conclusively presumed that such injury was not caused by serious and wilful misconduct.

(b) Where such conditions of compensation exist, *the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death;* provided, that where the employee is injured by reason of the serious and wilful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half, any of the provisions of this act as to maximum payments or otherwise to the contrary notwithstanding; provided, however, that said increase of award shall in no event exceed two thousand five hundred dollars.

(c) In all other cases where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed." (Italics ours.)

If an employee, by signing in California a contract for employment without the State, may enforce his claims through the Industrial Accident Commission for injuries received without the State, then it must also be true that such employee has waived his right to enforce a claim for negligence

through the courts, either Federal or State, or through the Industrial Accident Commission of another State. This mutual obligation underlies the basis of all these Acts as has been frequently announced by the courts.

In one of the earliest cases in which the highest court of the State of California construed the Act in question, it appeared that the employee, prior to instituting his proceedings before the Industrial Accident Commission, commenced an action for damages in the Superior Court of the State. A demurrer to his complaint was sustained. The question involved was whether or not the employee had any right of action in the courts after the passage of the Act. In denying this right the court said (*San Francisco S. Co. v. Pillsbury,* 170 Cal. 321):

> "* * * It will thus be seen that the right of the employee to resort at his option to an action at law for damages is restricted to the class of cases specified in the provision just quoted, viz, cases where the injury was caused by the employer's gross negligence or willful misconduct of a certain specified character. The judgment of the superior court in Broderick's action simply determines that the allegations of his complaint failed to state a case of this character, and therefore that the proper tribunal for the adjudication of his claim is the industrial accident commission."

In *Middleton v. Texas Power & Light Co.,* 249 U. S. 152, this court held that the compensation required by the Texas Employers' Liability Act to

be paid to an employee when he suffers personal injuries in the course of his employment:

> "is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employee, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employee of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer."

The noncitizen of the State who has signed his contract within the State has given up his right to maintain an action in the Federal Courts. If the employer resides in the State of California, as in the present case, the nonresident could, independent of the provisions of this Act, have commenced an action against the employer in the District of Alaska, where the Association is obliged to file a designation of agent upon whom process may be served (Laws of Alaska, Chapter 23) or in the State of Washington, where a similar provision exists (3722 Stat. Wash.). This right resulting from diverse citizenship would not belong to a resident of California, so that there necessarily follows at once an obvious inequality between the two several classes of claimants. The law has discriminated against the nonresident because it has compelled him to forego a right which did not belong to the State's own citizen.

The State cannot take away the right of a noncitizen to sue in the Federal Courts.

Union Bank of Tennessee v. Jolly's Adm'rs., 18 How. 503;
Hyde v. Stone, 20 How. 170;
Payne v. Hook, 7 Wall. 425;
Railway Company v. Whitton, 13 Wall. 270;
Harrison, Secretary, etc. v. St. Louis & San Francisco R. R. Co., 232 U. S. 318;
Wisconsin v. Phila. & Reading Coal Co., 241 U. S. 329.

Thus we reach the conclusion that if Section 58, relating to an accident without the State, is binding upon nonresidents as well as residents, then the above quoted Section 6, stating that the *liability* for the compensation provided by the Act shall be in lieu of any other liability whatsoever, has either set aside the fundamental law, and permits under the broad powers of this Act a noncitizen to be deprived of his right to sue in the Federal Courts, or Section 6 is as to such nonresident inapplicable. In the latter case further judicial construction of the Act is necessary. It must then be said that, although the liability for compensation as imposed upon the employer creates a *right* in favor of both citizens and noncitizens, the other provision of the Act which provides that the *liability* for such compensation is in lieu of all other claims does *not* apply equally to both classes. To make the Act harmonious in one respect and affect equally a citizen and a noncitizen, it is necessary

to add the word "nonresident" to Section 58 and at the same time, in order to prevent such construction resulting in the invalidity of the entire Act, Section 6 must be also judicially amended, so that it will read:

> "Liability for the compensation provided by this Act, *so far as it relates to compensation claimed by a resident of this State,* shall be in lieu of any other liability."

The addition of such language would at once inject into the Act the vice of inequality as between a resident and a nonresident.

The only escape from this situation is to hold that the entire Section 58 is invalid, because the right thereby attempted to be conferred carries with it an obligation which imposes upon the nonresident a greater burden than is imposed upon the resident.

The facts here involved afford a significant instance of such inequality. The employees who go to the Alaskan canneries largely reside without the State of California. They come only temporarily to San Francisco in order to sign their contracts, and then sail for the respective canneries. Some of them are residents of the State of Washington, and have no intention of returning to California, and, indeed, may be sent from San Francisco to work in a cannery in the State of Washington. Yet, under the theory of this case, if they are injured while working in the cannery in Washington,

their home State, they must come back to California to enforce whatever rights they may have against their employer. A further complication arises, in that the State of Washington has established an Industrial Accident Commission of its own, the powers of which differ radically from those of the California Commission. The record (folio 16) states that there is no law in Alaska providing for compensation for injuries to employees irrespective of negligence, but even this is a temporary condition, because there has been proposed for the Legislature of Alaska, which meets in May, 1921, an Act providing for the establishment of such a Commission for the Territory. A copy of this proposed Act is filed with these briefs.

Again, many of these men live in Mexico or Arizona, and simply come to San Francisco for the purpose of working in the Alaskan Canneries in the summer time. By this decision, they are foreclosed from commencing an action in the courts of the State where they are domiciled, or in the United States Courts, but must make their claim to the California Commission. The instant case, furthermore, affords a significant example of the extraordinary departure which these laws make from the common law, for it is here found that the employer was not negligent, but, on the contrary, the employee was negligent, and that his injuries resulted from such negligence on his part. Nevertheless, the employer is held liable. Surely the scope of such tribunals

must be limited if there is to be any certainty whatever as to the application of legal principles. If a man who has not been guilty of any wrong whatever is, nevertheless, compelled to pay money, and such award is legal, it should not be extended beyond the strictest terms of the statute; otherwise, chaos will result.

It is submitted therefore that the cases of which *Estate of Johnson* is a type do not control the present case. They were concerned with statutes (generally taxation measures) which conferred a privilege or immunity upon a citizen which stood alone and was free from complication or intertwining with a reciprocal obligation.

V.

A DISCRIMINATION BETWEEN RESIDENTS AND NONRESIDENTS VIOLATES SECTION 2 OF ARTICLE IV OF THE CONSTITUTION WITH THE SAME EFFECT AS IF THE DISCRIMINATION WERE BETWEEN CITIZENS OF THE SEVERAL STATES.

This court has given an express ruling upon this point in *Blake v. McClung*, 172 U. S. 239. In that case the statute attempted to give a preference to creditors who were residents of the State of Tennessee over those who were residents of other states or countries. The contention was urged that because the distinction was not between citizens of Tennessee and citizens of other states, but was between residents and nonresidents, there was no vio-

lation of the protection granted by the constitutional provision. This court held adversely to this contention.

In *Ward v. Maryland*, 79 U. S. 418, this court condemned as violative of Section 2 of Article IV an ordinance of the City of Baltimore requiring all persons other than *permanent residents of the State of Maryland* to obtain a license for selling certain articles of manufacture. Other authorities to the same effect are given in the footnote.*

There is no statement in the record that any of the parties in interest are *not* citizens of California. The only showing made is that they are residents of that State. The presumption which follows from this statement is that they are also citizens. Section 51 of the Political Code of California defines citizens as follows:

> "* * * 1. All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls;
>
> 2. All persons born out of this state who are citizens of the United States and residing within this state."

While it is true that under certain circumstances citizenship and residence are not the same thing (*La Tourette v. McMaster*, 39 Sup. Ct. Rep. 160),

State v. Nolan, 122 N. W. Rep. 255;
In re Watson, 15 Fed. Rep. 511;
In re Jarvis, 71 Pac. Rep. 576;
Commonwealth v. Myer, 23 S. E. Rep. 915;
Drew v. Cass, 113 N. Y. S. 1042;
Lewis v. State, 161 S. W. Rep. 154;
Brooks v. Mangan, 49 N. W. Rep. 633.

yet the record here does not give room for such distinction, the presumption being that all the parties are citizens of California as well as residents thereof. The decision in *La Tourette v. McMaster* (supra) construed a statute of South Carolina which permitted only those persons to be licensed as insurance agents who were residents of the State and had been such for at least two years. The term "resident" as here used was not contradistinguished from the term "citizen", but the policy of the State expressed in requiring a certain length of residence in order to equip one for a form of business enterprise.

VI.

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED.

Dated, San Francisco,
February 21, 1921.

Respectfully submitted,

WARREN GREGORY,
ALLEN L. CHICKERING,
DELGER TROWBRIDGE,
Attorneys for Plaintiff in Error.

TABLE OF CONTENTS.

TABLE OF CASES.

Table of Cases.—Continued.

No. 638.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

QUONG HAM WAH COMPANY,
Plaintiff-in-Error,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, AND A. J. PILLSBURY, WILL J. FRENCH AND MEYER LISSNER, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION, OWE MING, AND ALASKA PACKERS' ASSOCIATION, A CORPORATION,
Defendants-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA.

STATEMENT OF THE CASE.

Owe Ming was injured on July 30, 1918, at Cooks Inlet, Alaska, while working in a cannery of the Alaska Packers' Association as a machine tender. His immediate employer at the time was plaintiff-in-error Quong Ham Wah Company, to which the Alaska Packers' Association had sublet the procuring of laborers and a portion of the cannery work.

Plaintiff-in-error, like other California concerns, regularly recruits laborers in said state for the Alaskan fisheries. These laborers are taken from California with the fishing fleets in the spring and returned to California in the fall at the close of the season. At the time of his injury Owe Ming was a resident of California, and his contract of hire for the season's work in the canneries was made in California. After his injury he returned to California and, while disabled there, filed his claim with the California Industrial Accident Commission. The application was regularly heard and determined and an award made in favor of the applicant, which award is here under review.

Said award was made under the authority of section 58 of the California Workmen's Compensation, Insurance and Safety Act of 1917 (chapter 586, California Laws 1917), which reads as follows:

> "Sec. 58. The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The only contention made by plaintiff-in-error is the alleged repugnance of section 58 above to the constitution of the United States. This contention is two-fold in character.

1. That section 58 of the California Workmen's Compensation Act violates article IV, section 2 of the United States constitution, in that it contains an unwarranted discrimination between employees resident in California, and employees not so resident, amounting to a discrimination against the citizens of the several states.

2. That section 58 violates the "equal protection of the laws" clause of the Fourteenth Amendment to the federal constitution, for the same reason.

HISTORY OF THE CASE BELOW.

These two contentions were first presented to the Supreme Court of California in the case of *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767, 177 Pac. 848. There the attack was in fact made upon section 75 of an earlier workmen's compensation act (chapter 176, California Laws 1913), but as section 75 was carried over into the present workmen's compensation act as section 58, by reenactment without change, the statutory provisions considered are identical. In the above case the Supreme Court of California upheld the section against the attacks herein made, upon the preliminary point that an employer, not being a member of the class aggrieved by the alleged unconstitutional feature, could not raise the constitutional question.

In the present case this attack was renewed upon the same grounds. In its first decision herein (59 Cal. Dec. 18, apparently not reported elsewhere),

the Supreme Court of California reversed its holding in the Estabrook and Klamath Steamship Company cases, holding that the employer was privileged to attack the section. It went on to hold that such discrimination violated article IV, section 2, of the federal constitution by discriminating against nonresidents, and that the effect of such violation was to render the entire section void, thereby depriving resident employees of the protection of the section as well as nonresidents. Owe Ming, the injured employee in the present case, was a resident of California within the meaning of section 58 at the time of his injury.

A petition for rehearing was filed by counsel for the Industrial Accident Commission and granted by the California Supreme Court. In its decision upon rehearing, the decision here under review, the California court again held that the employer could raise the constitutional question, and that section 58 of the California act violated article IV, section 2, of the United States constitution, but went on to hold that the effect of such violation was to extend the privilege of section 58 to nonresident employees by force of the United States constitution, *ex proprio vigore,* instead of to invalidate the entire section and deprive resident employees of its benefits. Section 58 was accordingly upheld. This decision was based upon an earlier decision of the same court in *Estate of Johnson,* 139 Cal. 532, 73 Pac. 424, 96 A.S.R. 161.

The decision on rehearing of the California Supreme Court now comes to this court on writ of error.

OUTLINE OF CONTENTIONS.

Stating our contentions in the order in which this court will probably desire to consider them, our position is as follows:

PRELIMINARY CONSIDERATIONS.

1. Authorities sustaining the extraterritorial force of state workmen's compensation acts generally.

2. Considerations of policy underlying the extraterritorial application of state workmen's compensation acts.

ARGUMENT.

1. The judgment of the Supreme Court of California in this case should be affirmed upon the ground first assigned by that court in *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767, 177 Pac. 848, and, we contend, erroneously overruled in the present case. Said ground is:

> *Ground:* An employer, not being a member of the class discriminated against, cannot raise the constitutional question of alleged discrimination between resident and nonresident employees.

2. The judgment of the Supreme Court of California should be affirmed upon the ground assigned by that court in the present case, which is:

> *Ground:* Assuming that section 58 of the California act contravenes article IV, section 2, of the constitution of the United States by withholding its privileges from nonresidents, the effect of such contravention is to extend such privilege to such

nonresidents by the force of article IV, section 2, *ex proprio vigore,* and not to take away the benefits of said section 58 from resident employees.

3. Section 58 of the Workmen's Compensation, Insurance and Safety Act of the State of California does not violate article IV, section 2, of the constitution of the United States.

4. Similarly, section 58 of the California Workmen's Compensation Act does not violate the "equal protection of the laws" clause of the Fourteenth Amendment of the United States constitution.

PRELIMINARY CONSIDERATIONS.

I.

POWER OF THE STATES TO GIVE EXTRATERRITORIAL SCOPE TO WORKMEN'S COMPENSATION ACTS.

Apparently the power of the legislatures of the different states to give extraterritorial effect to state workmen's compensation acts, there being no question of discrimination involved, has never been questioned. Such power is not attacked by plaintiff-in-error in the present proceeding.

Some of the cases establishing the power of the states to give extraterritorial effect to statutes of this type are:

North Alaska Salmon Co. vs. *Pillsbury et al.,* 174 Cal. 1, 162 Pac. 93 (dictum);

Kennerson vs. *Thames Towboat Co.,* 89 Conn. 367, 94 Atl. 372;

Industrial Commission vs. *Ætna Life Insurance Co.*, 64 Colo. 480, 174 Pac. 589;
Friedman Mfg. Co. vs. *Industrial Commission of Illinois*, 284 Ill. 554, 120 N. E. 460;
Ruck vs. *Chicago Railway Co.*, 153 Wis. 158, 140 N. W. 1074;
Hagenback vs. *Leppert* (Ind.), 117 N. E. 531;
Pierce vs. *Bekins Van and Storage Co.* (Ia.), 172 N. W. 191;
Mulhall vs. *Fallon*, 176 Mass. 266, 57 N. E. 386;
In re Gould, 215 Mass. 480, 102 N. E. 693 (dictum);
State vs. *Dist. Ct.*, 139 Minn. 205, 166 N. W. 185;
State vs. *Dist. Ct. of Rice Co.* (Minn), 168 N. W. 177;
Rounsaville vs. *Central Railroad Co.*, 87 N. J. 371, 94 Atl. 392;
Deeny vs. *Wright & Cobb Lighterage Co.*, 136 N. J. L. J. 121;
Post vs. *Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351;
Grinnell vs. *Wilkinson*, 39 R. I. 447, 98 Atl. 103;
Gooding vs. *Ott*, 77 W. Va. 487, 87 S. E. 863;
Foughty vs. *Ott* (W. Va.), 92 S. E. 143;
Anderson vs. *Miller Scrap Iron Co.*, 169 Wis. 106, 170 N. W. 275.

The difference between elective and compulsory workmen's compensation acts, as bearing upon their extraterritorial effect, is well illustrated in *North Alaska Salmon Co.* vs. *Pillsbury et al.*, 174 Cal. 1, 162 Pac. 93.

An excellent annotation on the entire subject of extraterritorial effect of workmen's compensation acts is contained in 3 A. L. R. 1351 N.

II.

CONSIDERATIONS OF PUBLIC POLICY UNDERLYING EXTRATERRITORIAL EFFECT OF WORKMEN'S COMPENSATION ACTS.

Workmen's compensation acts are economic and sociological in character rather than juridical, and are to be construed so as to fulfill their purposes.

The principal purposes of all workmen's compensation acts are:

1. To secure greater social justice to wage earners by mitigating the hardships resulting from industrial injuries.

2. To protect the community against the direct and indirect consequences of poverty to the extent that it may be caused by industrial injuries.

By an industrial injury is meant the crippling or killing of a wage-earner by accident or injury occurring in the course of his employment. The effect of such industrial injury is to suspend the income, temporarily or permanently, of the injured workman, his family, or both, as such income depends upon the ability of the workman to earn wages. To suspend this income is to leave the workman or his family without their usual source of support, and hence to impoverish them. Industrial injuries are one of the principal sources of poverty. Poverty is more than a personal misfortune, it is a social evil as well, against which society and the state is entitled to protect itself. Human wastage in industry is a

harm to the state, as well as to the individuals directly concerned.

The direct consequences of poverty, produced in part by industrial injury, are that the workman or his family, or both, become dependent upon friends, relatives, public institutions or charity.

The indirect consequences of such poverty are even more harmful to the parties affected and to the community in which they reside than the direct consequences, but being less easily measured are less frequently noticed. Some of these indirect consequences are (1) lowering of the standard of living and morale of the family through loss of economic independence; (2) forcing of children to work at too early an age, with insufficient education, training or strength, which results in a tendency towards delinquency, lowered physical and mental vitality, increased susceptibility to disease, weakening of the next generation and a tendency toward the degeneration of a portion of the people who make up the body of the community; (3) the virtual crushing, by economic necessity, of the mother who tries to keep the family together; (4) the tendency toward crime, prostitution, alcoholism and other forms of delinquency which may result from the poverty of the family. Delinquency is more often a result than a cause of poverty.

With these observations in mind, the reason for the extraterritorial effect of workmen's compensation acts becomes apparent. Where the injury occurs

within the state it is conceded that the state may protect itself and its residents against these direct and indirect consequences of industrial injury, the social, as well as the immediate personal consequences of the injury being entitled to consideration.

N. Y. Cent. R. Co. vs. *White,* 243 U. S. 188, 61 L. Ed. 667;
Western Indemnity Co. vs. *Pillsbury et al.,* 170 Cal. 686, 151 Pac. 398.

The same consequences, to a less but still a substantial extent, flow where the injury occurs outside the state and the injured workman or his dependents are within the state during their period of adversity or dependency. It is part of the function and duty of a state to protect its citizens and residents, its common welfare and its public interests against harm. It is immaterial whether such harm be occasioned either by injuries occurring within or without the state, so long as the burden falls upon the citizens or residents of the state or the state itself.

To illustrate. In the present case, labor is recruited in California during the spring for work in the Alaska fisheries during the open season, to be returned to California at the end of the season. Workmen who are crippled in the course of such work in Alaska are returned to California either on the next vessel after the injury or when the uninjured workers return, and such workmen affect the interests of California from and after their return to as great an extent as if they had been injured within the state.

If a workman be killed in Alaska in the course of the fishing season, he may leave a widow and orphans in California, in which case the interests of California are as much affected as though the fatal injury had occurred within the state. If such workmen, though not killed, have families in California, and are prevented by their injuries, either for a temporary period or permanently, from supporting their dependents, the burden upon the state is greater for the period of their incapacity than if they had been killed.

To illustrate again. Many traveling salesmen are hired in California, reside in California, and have their families in California, but travel through a number of Western states in the course of their work. An injury to such salesman in any state affects the welfare of the State of California, its citizens and residents to just as great an extent as if the injury occurred in California.

Another illustration. Men are frequently recruited in California for large construction jobs, such as building railroads, electric power plants, etc., carried on in other Western states. These men have their homes in California and frequently have families or other dependents permanently residing in California. Injuries to such workmen abroad affect the interests of citizens and residents of the state and the welfare of the community in which they reside as much as if such injuries occurred within California.

Every state protects its citizens and residents while abroad, not only because of state pride, but also

because the state is affected by misfortune to its citizens and residents.

Upon grounds of expediency, also, the extraterritorial scope of a workmen's compensation act is advisable for all parties. In the case of an employer who conducts a considerable portion of his business in California, but has employees traveling outside the state, it is a benefit to him to be able to insure his entire business under the law of California under one insurance policy, rather than take out separate insurance policies in every foreign state in which any of his men may go on business. For instance: The "A" company has its principal place of business and most of its employees in California but sends traveling representatives to Oregon, Washington, Idaho, Montana and Nevada. This concern informs us that it urgently desires to cover all its employees in one insurance policy under the California Workmen's Compensation Act, rather than to comply with the separate requirements of five different states. All of its traveling employees have their places of permanent residence and headquarters in California.

The same is true to a large extent of the Alaska fisheries. These canneries are usually located at points in Alaska remote from hotels, cities and courts. It is an inconvenience to the employer to maintain attorneys and hold witnesses at Alaska courts in towns remote from their canneries for litigation when, in the natural order, all parties would return to California at the conclusion of the season. It is

more convenient for the employer to apply the law of California to his entire enterprise.

The same motives of expediency and convenience apply to injured employees. It is difficult, if not impossible, for such employees to remain in Alaska and keep witnesses there awaiting litigation. They, quite naturally, prefer to return to their homes during their incapacity rather than remain in a strange locality awaiting the outcome of pending litigation, which may be long drawn out.

The only other possibility open to such employer or employee is a suit in the courts of California under the laws of Alaska. This is less desirable to all parties than to apply the California Workmen's Compensation Act in the California tribunal, for the following reasons:

(*a*) The parties may be compelled to operate under a number of different foreign laws with which they are not familiar.

(*b*) Such foreign laws could not be enforced in California before respondent Industrial Accident Commission, as its jurisdiction is limited to the application of the California Workmen's Compensation Act. As between the California Commission and the California courts, the Commission affords a remedy, which for speediness and inexpensiveness, is very much preferable to that afforded by the courts.

(*c*) If a workmen's compensation act of Alaska be applicable, procedural questions immediately develop as to whether it could be enforced in a California tribunal, or in any tribunal outside of Alaska.

If it be an elective act, it would be difficult to establish an election under it as the parties are hired in California and other Pacific Coast states and not in Alaska.

Mainly because of the reasons stated above, most of the forty-three states now having workmen's compensation acts have given extraterritorial scope to such acts in one way or another.

ARGUMENT.

I.

THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IN THIS CASE SHOULD BE AFFIRMED UPON THE GROUND FIRST ASSIGNED BY THAT COURT IN ESTABROOK STEAMSHIP CO. AND KLAMATH STEAMSHIP CO. vs. INDUSTRIAL ACCIDENT COMMISSION, 177 CAL. 767; 177 PAC. 848, AND, WE CONTEND, ERRONEOUSLY OVERRULED IN THE PRESENT CASE. SAID GROUND IS:

> *Ground*: An employer can not attack a statute upon the constitutional ground of alleged discrimination between resident and nonresident employees, as he is not a member of the class aggrieved by the discrimination. One who does not belong to the class that might be injured by the alleged unconstitutional feature of a statute cannot raise the question of its validity.

The plaintiff-in-error is an employer of labor, and is here attacking the constitutionality of section 58 of the California Workmen's Compensation Act upon

the ground that it contains an illegal discrimination between certain classes of employees injured outside the state, i. e., employees who are nonresidents and who are residents of California at the time of their injury. It is not privileged to make this attack as it is not a member of the class alleged to be discriminated against.

The Supreme Court of California so held, the first time the questions here raised came before it, in *Estabrook Steamship Co.* and *Klamath Steamship Co.* vs. *Industrial Accident Commission*, 177 Cal. 767; 177 Pac. 848. As this opinion is short and squarely in point, we are printing it in full for the convenience of the court in the appendix to this brief as Exhibit "A" and respectfully call the attention of the court to it.

Subsequently, and in the present proceeding, the personnel of the California Supreme Court having changed in the meantime, the decision in the foregoing case was overruled. We contend that the original position of the California court was correct.

This court has ruled steadfastly and uniformly, without recognizing any of the exceptions attempted to be drawn by the California Supreme Court in the present case, that a person not a member of the class alleged to be discriminated against, cannot raise the constitutional question.

Arizona Copper Co. vs. *Hammer*, 250 U. S. 400;
Aitken vs. *Kingsbury*, 247 U. S. 484, 489, 62 L. Ed. 1226;

Mountain Timber Co. vs. *Washington*, 243 U. S. 219, 61 L. Ed. 685;
Hendrick vs. *Maryland*, 235 U. S. 610, 623, 59 L. Ed. 385, 391;
Jeffrey Mfg. Co. vs. *Blagg*, 235 U. S. 571, 59 L. Ed. 364;
Erie R. R. Co. vs. *Williams*, 233 U. S. 685, 58 L. Ed. 1155;
M. K. and T. Ry. vs. *Cade*, 233 U. S. 642, 648, 58 L. Ed. 1135;
Plymouth Coal Co. vs. *Pennsylvania*, 232 U. S. 531, 58 L. Ed. 713;
Darnell vs. *Indiana*, 226 U. S. 390, 398, 57 L. Ed. 267;
Citizens National Bank vs. *Kentucky*, 217 U. S. 443, 453, 54 L. Ed. 832;
Hatch vs. *Reardon*, 204 U. S. 152, 51 L. Ed. 415;
Lee vs. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106;
Covington vs. *First National Bank*, 198 U. S. 100, 49 L. Ed. 963;
Spraigue vs. *Thompson*, 118 U. S. 90, 30 L. Ed. 115;
Bozeman vs. *State*, 63 Ala. 201, 61 So. 604;
Scott vs. *Nashville Bridge Co.* (Tenn.), 223 S. W. 844.

It has also been the rule in California until the present case.

Murphy vs. *State of California*, 8 Cal. App. 440, 97 Pac. 199 (affirmed in 225 U. S. 625, 55 L. Ed. 1032);
Estate of Johnson, 139 Cal. 532, 73 Pac. 424;
Estabrook Steamship Co. and Klamath Steam-

ship Co. vs. *Industrial Accident Commission, supra,* 177 Cal. 767, 177 Pac. 848;
Estate of Damon, 10 Cal. App. 542, 102 Pac. 684;
Ritz vs. *Lightson,* 10 Cal. App. 685, 689, 103 Pac. 363.

In *Jeffrey Mfg. Co.* vs. *Blagg,* 235 U. S. 571, 59 L. Ed. 364, a workman's compensation case, this court said:

"Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employee in a shop with five employees with those having less. *No employee is complaining of this act in this case.* The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive, for it is the well settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality *in the feature complained of. Southern Ry.* vs. *King,* 217 U. S. 524, 534; *Engel* vs. *O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co.* vs. *Wright,* 225 U. S. 540, 550; *Yazoo & M. Valley R. Co.* vs. *Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal* vs. *New York,* 226 U. S. 260, 271; *Darnell* vs. *Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co.* vs. *Pennsylvania,* 232 U. S. 531, 544; *Missouri, K. & T. R. Co.* vs. *Cade,* 233 U. S. 642, 648." (Italics ours.)

In the first decision below in the present case, Mr. Justice Wilbur dissented, holding that the employer (plaintiff-in-error here) was not privileged to raise the constitutional point. In the decision upon rehearing he adhered to the same position, although concurring in the result upon the other ground. His dissenting opinion on the first decision contains a more able exposition of our position upon this point than any we can present, and we accordingly incorporate the relevant portions of it in this brief as Exhibit "B" in the Appendix and respectfully direct the attention of the court to it.

In the case at bar the court below allowed the employer to raise the constitutional question upon the theory that the case fell within each of two exceptions to the rule, such exceptions being established in the cases of *Greene* vs. *State*, 83 Neb. 84, 119 N. W. 6, and *Buchanan* vs. *Worley*, 245 U. S. 60, 72, 60 L. Ed. 149, respectively. This necessitates a brief consideration of these two cases, although plaintiff-in-error now seems to rely only upon the second of the two cases.

(*a*) *Greene* vs. *State*.

In addition to the points made in Mr. Justice Wilbur's dissenting opinion we attack the soundness of the holding in *Greene* vs. *State*, *supra*, upon the following grounds:

1. The case stands alone. So far as we can ascertain, its doctrine has never been approved by this court, nor sustained upon square consideration of

the question by any other court, with the exception of the present case below.

2. The rule of *Greene* vs. *State,* that where no member of the class affected by the discrimination is in a position to raise the constitutional question, any person affected thereby can do so, is squarely opposed to the long continued and uniform line of decisions of this court, some of which have been cited above, and to the principle upon which they are based.

This court states the rule without qualification or exception.

> "Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto. *Hatch* vs. *Reardon,* 204 U. S. 152, 161; *Williams* vs. *Walsh,* 222 U. S. 415, 423; *Collins* vs. *Texas,* 223 U. S. 288, 295, 296; *Missouri, K. & T. Ry. Co.* vs. *Cade,* 233 U. S. 642, 648, and cases cited."
>
> *Hendrick* vs. *Maryland,* 235 U. S. 610, 623, 59 L. Ed. 385, 391.

3. The doctrine of *Greene* vs. *State* is squarely opposed to the ruling of this court that only a person who is injuriously affected by the *alleged unconstitutional feature* can attack the constitutionality of a statute. He must be injured by the *discrimination* itself and not merely by the legislation as a whole as a possibly invalid act. Stated in another way, the statute which he is attacking must deprive him, not someone else, of a constitutional right.

We quote at random from decisions of this court:

"The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. *He must show that the alleged unconstitutional feature* of the law injures him, and so operates *as to deprive him* of rights protected by the Federal constitution.' *Southern Ry. Co.* vs. *King,* 217 U. S. 524, 534. See also *Tyler* vs. *The Judges,* 179 U. S. 405; *Turpin* vs. *Lemon,* 187 U. S. 51, 60; *Hooker* vs. *Burr,* 194 U. S. 415; *Hatch* vs. *Reardon,* 204 U. S. 152, 160; *Collins* vs. *Texas,* 223 U. S. 288, 295." *Standard Stock Food Co.* vs. *Wright,* 225 U. S. 540, 550, 55 L. Ed. 1197, 1201. (Italics ours.)

"But if it be assumed—an assumption not sustained by any decision of the Kentucky Court of Appeals—that the third section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be made by one *unaffected by the alleged invalid feature. Austin* vs. *Boston,* 7 Wall. 694; *Albany County* vs. *Stanley,* 105 U. S. 305; *The Winnebago,* 205 U. S. 354." *Citizens National Bank* vs. *Kentucky,* 217 U. S. 443, 453, 54 L. Ed. 832, 836. (Italics ours.)

The mere fact that a defendant is made to suffer the penalties of an alleged invalid statute is not a

sufficient interest to enable him to plead the unconstitutionality of the statute. This has been held by this court in many cases, including the following, in which the penalties of the law were enforced, even though the law might be held unconstitutional if attacked by a proper party. So in the present case, the fact that plaintiff-in-error will have to pay a judgment of $464.85 does not give it a sufficient interest to attack the statute.

Murphy vs. *State of California*, 225 U. S. 625, 55 L. Ed. 1032;
Erie R. R. Co. vs. *Williams*, 233 U. S. 685, 58 L. Ed. 1155;
Lee vs. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106;
Citizens National Bank vs. *Kentucky* (*supra*), 217 U. S. 443, 54 L. Ed. 832;
Hendrick vs. *Maryland*, 235 U. S. 610, 59 L. Ed. 385, 391;
State vs. *Haskell*, 84 Vt. 429, 79 Atl. 852.

In the present case, plaintiff-in-error has no further interest in the subject matter of the statutory provision under attack than that the entire statute may be enforced against it. Being an employer, it is not injuriously affected by the discrimination between resident and nonresident employees injured extraterritorially. No right of the employer, secured by the United States constitution, is violated by such discrimination between classes of employees. Plaintiff-in-error therefore has no sufficient interest in the question of discrimination to permit it to attack the statute upon this ground and *Greene* vs. *State* is wrong if it holds to the contrary.

4. Applied to the specific grounds of invalidity urged in the present case, the invalidity of the exception claimed by the court below is still further apparent. It is established by the decisions of this court, as pointed out in the next subdivision of this brief, that neither article IV, section 2, nor the "equal protection of the laws" clause of the Fourteenth Amendment to the federal constitution, have the effect of circumscribing the power of the states to legislate concerning their own citizens, where the question of discrimination between citizens and non-citizens is involved. The effect of these constitutional provisions is to secure equality of treatment to non-citizens or residents, not to restrict the state in dealing with its own residents.

Slaughter House Cases, 16 Wall. (83 U. S.), 36, 77, 21 L. Ed. 394;

State vs. *Swanson,* 182 Ind. 582, 107 N. E. 275;

U. S. vs. *Wheeler,* 41 S. Ct. 133.

Hence a citizen of a state cannot complain of a statute of his own state, no other feature of invalidity being alleged, upon the ground that such statute discriminates against citizens of other states.

McCarter vs. *Hudson County Water Co.,* 70 N. J. Eq. 696, 65 Atl. 489, 492.

(*b*) *Buchanan* vs. *Worley.*

The other case relied upon below and the only case relied upon here is *Buchanan* vs. *Worley,* 245 U. S. 60, 62 L. Ed. 149. This case can be disposed of in a few words. The validity of the ordinance in that case was attacked upon two grounds, as shown by

the excerpts from the brief contained in the official report of the case and by the opinion of this court, as follows: (1) That the ordinance in question interfered with a property right of the plaintiff secured by the "due process" clause of the Fourteenth Amendment, i. e., the right to sell his property in an open market, without restriction as to character or color of possible purchasers; (2) That it contained an unconstitutional discrimination against colored and white persons and thus denied colored persons the equal protection of the laws.

The court below in the present case assumed that *Buchanan* vs. *Worley* warranted an exception to the rule that only a member of the class discriminated against could raise the constitutional question, as plaintiff-in-error, a white person, there was held entitled to attack the ordinance. It clearly appears from the opinion of this court, however, that no such exception was created, as the case went off upon the other ground of attack. It was not held that a white man could raise the question of *discrimination* against negroes. It was instead held that the ordinance was not a legitimate exercise of the police power and deprived a white owner of land of a property right (the right to sell his property in an open market) in violation of the "due process" clause of the Fourteenth Amendment. It therefore establishes no exception in point in the present case.

II.

THE JUDGMENT BELOW SHOULD BE AFFIRMED UPON THE GROUND ASSIGNED BY THE SUPREME COURT OF CALIFORNIA IN THE PRESENT CASE, WHICH IS:

> *Ground:* If section 58 of the California act contravenes article IV, section 2 of the federal constitution, the effect is not to strike down the grant of the statutory privilege of section 58 to residents, but is instead to extend the privilege to nonresidents by the force of the constitutional provision.

Usually, where a statutory provision contravenes the constitution, the effect is to nullify the entire provision. There are exceptions to this rule. Sometimes the constitutional mandate is vindicated in other ways, depending upon the object to be secured. For instance, in the present case the object sought to be accomplished by article IV, section 2, of the federal constitution is to secure equality of treatment to citizens of other states. Where, as here, the statute in question confers a special privilege upon its own citizens and residents, without extending it to nonresidents or noncitizens, the simplest and most effective way of vindicating the federal constitution is to give such privilege directly to the citizens of the other states, rather than to go through the roundabout method of destroying the grant to residents, leaving it to the legislature to re-enact the section in a different form. The former, we contend, is the effect of article IV, section 2, in the present case.

The principal authority in support of our position is the decision of the Supreme Court of California in *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424. As the opinion in this case is the fullest and clearest statement of the rule in any decision yet rendered upon the question, we have incorporated it in this brief as Exhibit "C" in the Appendix. It is difficult, if not impossible, to state our position in any better language than that contained in *Estate of Johnson*, and we therefore request the court to consider the points made in that opinion as if made in detail in our brief proper.

We also attach, for the convenience of the court, as Exhibit "D" in the Appendix, those portions of the main and concurring opinions below in the present case relevant to the question here under discussion.

The rule of *Estate of Johnson* has been approved, sometimes with and sometimes without comment upon the principle involved, in the following cases, in which privileges granted by a state to its residents were extended by the courts to nonresidents.

Wiley vs. *Parmer*, 14 Ala. 627, 629, 631;
Doe vs. *Roe* (Ala), 51 So. 991;
Black vs. *Seal*, 6 Houst. (Del.) 541;
State vs. *Swanson*, 182 Ind. 582, 107 N. E. 275;
Roby, Trustee, vs. *Smith et al.*, 131 Ind. 342;
State vs. *District Court*, 126 Minn. 501, 148 N. W. 463;
Steed vs. *Harvey*, 18 Utah 372, 54 Pac. 1011;
Sprague vs. *Fletcher*, 69 Vt. 69, 37 Atl. 239;

Deatricks Admr. vs. *State Life Ins. Co.* (Va.), 59 S. E. 489;
Konkel vs. *State,* 168 Wis. 335, 170 N. W. 715;
Eingartner vs. *Illinois Steel Co.,* 94 Wis. 70, 68 N. W. 664;
Shirk vs. *City of La Fayette,* 52 Fed. 857;
Detroit vs. *Osborne,* 135 U. S. 492, dictum p. 498, 34 L. Ed. 260.

See 11 Federal Statutes Annotated, 2d ed., pp. 231-2, where the doctrine of *Estate of Johnson* is adopted without reservation.

The decisions of this court upon which the rule of *Estate of Johnson* was based are as follows:

Slaughter House Cases, 16 Wall (83 U. S.) 36, 77, 21 L. Ed. 394;
Blake vs. *McClung,* 172 U. S. 239, 258, 259, 43 L. Ed. 432;
Cole vs. *Cunningham,* 133 U. S. 107, 113-4, 33 L. Ed. 538;
U. S. vs. *Wheeler,* 41 S. Ct. 133;
Ward vs. *Maryland,* 12 Wall. (79 U. S.) 418, 430, 20 L. Ed. 449;
Paul vs. *Virginia,* 8 Wall. (75 U. S.) 180, 19 L. Ed. 357;
Detroit vs. *Osborne,* 135 U. S. 492, 498, 34 L. Ed. 260.

Our detailed contentions upon this point are as follows:

1. ARTICLE IV, SECTION 2, OF THE UNITED STATES CONSTITUTION IS A CONSTITUTIONAL GRANT OF PRIVILEGES TO CITIZENS OF THE SEVERAL STATES AND NOT A MERE PROHIBITION UPON THE LEGISLATIVE POWER OF THE STATES. IT IS SELF-EXECUTING AND NOT MERELY RESTRICTIVE.

(*a*) *The Language of Article IV, Section 2.*

This appears from the language of article IV, section 2, subdivision 1, which reads:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The words "shall be entitled" are words of grant. They affirmatively confer upon noncitizens of a state certain privileges and immunities of citizenship which the state confers upon its own citizens. If the provision were intended merely to prohibit discriminatory legislation by the state, without affirmatively securing privileges and immunities to citizens of the several states, its language would have been somewhat to this effect:

> "No state shall ever grant any privileges or immunities to its own citizens, unless granted upon the same terms to the citizens of the several states."

The failure to use any such language of prohibition shows that the purpose of the constitutional provision is to *confer* and *communicate* privileges to the

citizens of the several states, and not merely to restrict the power of each state, by invalidating *in toto* any legislation which failed to give to citizens of other states their due.

Being a constitutional grant, article IV, section 2, is self-enforcing. It does not need state legislation to complete its effectiveness. Therefore, if section 58 of the California Workmen's Compensation Act contravenes this constitutional provision, the result is that nonresidents of California are entitled by the force of the constitutional provision, to privileges given by section 58 to residents of California.

(*b*) *The Context of Article IV, Section 2.*

This conclusion is reinforced by noting the arrangement of the United States Constitution, and the context of the provision in question. Limitations, as such, upon the legislative power of the states are collected together in article I, section 10 of the constitution. Under article I, section 10, any contravening state legislation is invalid in its entirety, by the force of the constitutional prohibition.

But in article IV the subject matter of the four regulatory provisions contained in sections 1 and 2 of this article (the remainder of article IV dealing with matters here irrelevant) is of an entirely different nature. The four regulatory provisions are not primarily prohibitory in character, but instead primarily regulate directly the rights and subject matter with which they deal, without the intervention of state enforcing agencies. All four provisions are

direct grants of rights, privileges and immunities, binding upon the individuals and subject matter affected.

For instance, section 1 of article IV *confers* full faith and credit upon public acts, etc., of the different states. It does not state that every state shall by legislation confer such full faith and credit upon the public acts of other states. Neither is it merely prohibitive, striking down legislation which denies full faith and credit. It *confers* full faith and credit *ex proprio vigore* upon the public acts, etc., in question.

Similarly, subdivisions 2 and 3 of section 2 of article IV, contained in the same section and immediately following the provision invoked in the present case, dealing with fugitives from justice and fugitive slaves, operates and operated directly upon the subject matter and private rights involved, and not primarily upon or through the legislative power of the states.

The contention of plaintiff-in-error in the present case is that article IV, section 2, does not extend the privileges of section 58 of the California Workmen's Compensation Act to nonresidents of California, because the legislature of California has not authorized such extension, and therefore strikes down section 58 entirely because of unconstitutionality, annulling the grant of the privilege to residents as a means of securing equality with nonresidents. Both the language of article IV, section 2, and its context, establish the unsoundness of this contention. Both

article IV, section 1, and subdivisions 1, 2 and 3 of section 2, operate directly upon the subject matter, *conferring* the rights therein given by the force of the federal constitution. The exercise of state legislative power is not necessary to the effectiveness of the grant of rights in these provisions of the federal constitution.

(c) *Construction Given Article IV, Section 2, by This Court.*

In *Ward* vs. *Maryland*, 12 Wall. (79 U. S.) 418, 430, 20 L. Ed. 449, 452, this court, through Mr. Justice Clifford, said:

> "Comprehensive as the power of the states is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the court, that the power can not be exercised to any extent in a manner forbidden by the constitution; and, inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the *defendant might lawfully sell, or offer or expose for sale*, within the district described in the indictment, *any goods which the permanent residents of the state might sell*, or offer or expose for sale in that district, *without being subjected to any higher tax or excise than that exacted by law of such permanent residents.*" (Italics ours.)

The result of the decision in this case was twofold: (1) it struck down a discriminatory burden imposed upon nonresidents; (2) it sustained by affirmative language the right of Ward, a nonresi-

dent, to sell goods in Maryland without hindrance, upon the same terms as those imposed upon permanent residents.

Squarely to the point, this court in the *Slaughter House Cases*, 16 Wall. (83 U. S.) 36, 77, 21 L. Ed. 394, 409, speaking through Mr. Justice Miller, said:

> "The constitutional provision there alluded to, did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause, no security for the citizens of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.
>
> "Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions upon their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Cole* vs. *Cunningham*, 133 U. S. 107, 113–4, 33 L. Ed. 538, 542, this court held:

> "The intention of section 2 of article IV was to *confer* upon the citizens of the several states a general citizenship, and to *communicate* all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to initiate actions." (Italics ours.)

(*d*) *The Purpose and Object of Article IV, Section 2.*

The purpose and object of article IV, section 2, also necessitates the construction given the provision by *Estate of Johnson, supra.* They are to secure equality of treatment to the citizens of the several states.

Such equality is best secured by the rule of *Estate of Johnson.* Under this rule the effect of article IV, section 2, is either—

(*a*) To communicate or confer the privilege upon the citizens of other states, where granted by a state to citizens alone; or

(*b*) To strike down a burden imposed by a state upon citizens of other states, where no corresponding burden is imposed upon its own citizens;

Article IV, section 2, does not and can not

(*c*) Strike down a benefit conferred by a state upon its own citizens because the state omitted to extend such benefit to noncitizens.

The effect of this construction is to accomplish, in the most direct manner, the objects which the "privileges and immunities" clause of article IV, section 2, was adopted to accomplish. Whenever a state gives privileges and immunities to its own citizens and wrongfully withholds them from noncitizens, the constitutional provision secures such privileges automatically and expeditiously to noncitizens. The roundabout method of nullifying state legislation as a penalty for failure to give equality

to noncitizens, necessitating new state legislative action to secure the purpose originally intended, if it can thus be secured, is resorted to only where equality can not be secured directly.

ANSWER TO BRIEF OF PLAINTIFF-IN-ERROR UPON THIS POINT.

1. WHERE AFFIRMATIVE STATE LEGISLATIVE ACTION IS AND IS NOT REQUIRED.

Mention has been made before of the rule that where a state grants privileges to its own citizens, the federal constitution in proper cases automatically extends such privileges to noncitizens. This rule was attacked below by plaintiffs-in-error and is here attacked upon the ground that the California Workmen's Compensation Act indicates no legislative authority for the extension of its benefits to nonresidents injured extraterritorially. It is claimed that the obligation of a workmen's compensation act can only be imposed upon employers by the state legislature, and where the legislature has not extended the provisions of said act to cover nonresidents, the federal constitution can not be interpreted to give such extension. It can only nullify the state legislation.

This contention is fully answered by the California Supreme Court in *Estate of Johnson* (*supra*) and in the opinion in the present case (Exhibits "C" and "D" in the Appendix to this brief), to which the court is referred.

Supplementing what is there said, plaintiffs-in-error have failed to grasp the distinction, as affecting the rights of noncitizens or nonresidents, between

the action of a state in conferring benefits upon its residents alone, and its action in imposing discriminatory taxes or burdens against nonresidents alone.

Where a burden is imposed upon a nonresident alone, equality of treatment can be secured by article IV, section 2, in one of two ways:

(*a*) by striking down the burden; or

(*b*) by imposing a corresponding burden upon residents.

The second the constitutional provision can not do, for want of authorization from the state legislative body, hence the former is the only method of securing equality.

Where, however, a state confers special privileges upon its own citizens alone, such privileges can be extended to nonresidents by the force of the federal constitution for the reasons stated in *Estate of Johnson, supra,* 139 Cal. 532, 73 Pac. 424. The federal constitution is the supreme law of the land, and can and does give to residents of other states sojourning in a state certain privileges given residents of the latter state by their own statutes, and this result more directly fulfills the purpose and object of the constitutional provision.

This distinction may be stated in another form by reference to the fundamental principle hereafter alluded to, that article IV, section 2, does not profess to control the power of the state over its own citizens and residents. It affects the relation of the state to noncitizens only.

It is perfectly true that article IV, section 2, can not be interpreted so as to grant privileges or impose duties upon *residents of the state enacting the legislation.* Only the state legislature can do this. And where there is no authority from the state legislature for such action, the privilege or burden can not be given residents by construction of the federal constitution. For instance, neither the United States Constitution nor the federal Congress can dictate to the State of California as to what classes of (resident) employees shall be included within the California Workmen's Compensation Act. Nor can the federal government compel the state government to impose taxes or burdens upon its own residents. These are matters of state action reserved exclusively to the states. Article IV, section 2, does not control such power of the state. To this extent, plaintiffs-in-error's contention is correct, and this was recognized in *Estate of Johnson, supra,* and in the present case.

Where, however, the State of California affirmatively gives privileges or immunities to its own residents, the federal constitution provides in certain cases that such privileges shall also extend to non-residents. The constitution of the United States is the supreme law of the land and a part of the law of every state. The people of the United States have by their supreme law willed that citizens of each state shall enjoy the same privileges in a state as its own citizens and residents. Action of the

state legislature, beyond that defining the rights of residents, is not required to complete the extension of such rights to citizens of other states. A higher law than the state statute confers the privilege.

The case at bar being one of a privilege conferred by the State of California upon its own residents, and not one of a discriminatory tax, license fee or other burden imposed upon nonresidents alone, it follows that section 58, if it contravenes article IV, section 2, is extended by a higher law to include nonresidents within its benefits, and hence is valid as to both classes of employees.

The rule that article IV, section 2, of the United States constitution, where it applies, extends *ex proprio vigore* to noncitizens the privileges and immunities given by a state to its own citizens, is further established by the following consideration. At the expense of repetition, we say:

Article IV, section 2, does not limit or control the power of a state over its own citizens. Therefore its applicability must be limited to such portions of a questioned state statute as affect noncitizens or nonresidents. It can only confer privileges or strike down discriminatory burdens, as the case may be, as to noncitizens or nonresidents. It can not strike down a grant by a state of a privilege or immunity to its own citizens, as such is purely a state matter.

Slaughter House Cases, 16 Wall. (83 U. S.), 77, 21 L. Ed. 394;

Bradwell vs. *Illinois,* 16 Wall. 130, 138;

United States vs. *Harris*, 106 U. S. 629, 643, 27 L. Ed. 290;
United States vs. *Wheeler*, 41 S. Ct. 133;
Estate of Johnson, 139 Cal. 532, 73 Pac. 424;
State vs. *Swanson*, 182 Ind. 582, 107 N. E. 275;
Commonwealth vs. *Griffin* (Ky.), 3 B. Mon. 208;
Wierse vs. *Thomas* (N. C.), 59 S. E. 58.

Since article IV, section 2, can not be applied to limit the power of a state in dealing with its own residents, it follows inevitably that it can not be applied in the present case to strike down the grant of privileges conferred by section 58 of the California act upon residents of California. It can only be applied to affect the rights of nonresidents. In so doing it may either, as stated above,

(*a*) Extend a privilege to nonresidents; or

(*b*) Annul a discriminatory burden imposed upon nonresidents.

By doing either of these things it fully secures the equality of treatment which it is its purpose to obtain. It can not

(*c*) Annul the grant of a privilege or immunity to a resident, because it does not control the power of a state over its own residents; or

(*b*) Impose a tax or other burden upon its own residents, in the absence of authority so to do from the legislature of the state, in order to equalize a corresponding tax or burden imposed on nonresidents only, and otherwise illegally discriminatory. Burdens can be imposed upon citizens only by the legislatures of their own states.

Since the workmen's compensation claimant in the present case under section 58 of the California Workmen's Compensation Act (defendant-in-error Owe Ming) is and was at the time of his injury a resident of California, it follows that the award and judgment in his favor below should be affirmed, the question of the rights of nonresidents being a question with which he is not concerned.

2. CONCERNING THE RIGHT TO A "COMMON-LAW REMEDY" AND TO HAVE RECOURSE TO THE FEDERAL COURTS UNDER DIVERSITY OF CITIZENSHIP.

Plaintiff-in-error's second ground of attack upon *Estate of Johnson, supra*, contains a roundabout process of reasoning which culminates in the claim that since some nonresidents are supposed to be denied recourse to the federal courts under diversity of citizenship by the extension of section 58 to them and by the exclusiveness of the rights and remedies given by the state compensation act, the section is therefore void by reason of the imposition of a discriminatory burden upon them by treating them exactly the same as residents.

In answer, we would first call attention to the fact that plaintiff-in-error, an employer, is not interested in whether or not a nonresident employee, a citizen of another state, can maintain a proceeding in the United States courts under diversity of citizenship. That question can be taken up when it arises properly.

We next call the attention of the court to the general situation here presented. Plaintiff-in-error first claims that section 58 is discriminatory because it fails to include nonresidents within its benefits.

Plaintiff-in-error now claims that it discriminates against nonresidents if it does include them within its benefits, by depriving them of a right to sue in the federal courts. And yet it is agreed that the states can give extraterritorial effect to their workmen's compensation acts. We are unable to see the consistency of this position.

Taking up the contention in more detail, we concede that both the right and the remedy provided by the California Workmen's Compensation Act are exclusive as to residents of California coming within its terms. The act deprives resident employees of: (*a*) What is usually termed the "common-law remedy," meaning thereby the right given injured employees against their employers by the general law, statutory or nonstatutory, in the absence of a workmen's compensation act; and (*b*) Recourse to the courts of the state to enforce the state act, the remedy provided by it being before an administrative board exclusively (Industrial Accident Commission).

Applying the California act, by the operation of section 58, to nonresidents injured outside the state, it is not true that such nonresidents are deprived of a "common-law remedy" under the law of California.

A nonresident of California injured outside the state does not under any circumstances have a right to sue for tort under the California law. The general law of California, statutory and nonstatutory, dealing with tortious injuries, has no extraterritorial application. A tort is invariably governed by the law of the state in which the injury occurs, 12 Corpus Juris 452; 26 Cyc. 1079. The provisions of the California statutes allowing damages to an employee for tortious injury are contained in sections 1969 and 1971 of the California Civil Code, which do not pur-

port to operate beyond the state. The presumption that such statutes are not intended to have extraterritorial effect governs. *North Alaska Salmon Co.* vs. *Pillsbury et al.*, 174 Cal. 1.

Neither does section 58 deprive a nonresident of California injured outside the state from bringing suit under the laws of the state of injury. If such person has a "common-law remedy" under the *lex loci delicti*, section 58 does not prevent its enforcement. California can not enact a law depriving a nonresident of California, injured in Oregon, of any right conferred upon him by the law of Oregon. Such action would be an invasion of the sovereignty of Oregon and wholly void. Moreover, nothing in the California Workmen's Compensation Act purports or attempts to nullify rights created under the laws of another state. The only effect section 58 can have, is to give the injured employee an election of remedies, *i. e.*, a choice between the laws of the two states involved. The injured employee has the right to the protection of the law of each state, but can not claim a double recovery for the same injury. As to injuries occurring outside the state, section 58 must therefore be interpreted to make the compensation right and remedy exclusive *only against all other rights and remedies given by the law of California.* Beyond that it can not, and does not, attempt or purport to go.

The claim that section 58, construed to include nonresidents, would deprive them of a right of action in the United States courts under diversity of citizenship, presents several aspects. A suit in the United States court is necessarily predicated upon a cause of action, *i. e.*, a violation of a right conferred by the law of some jurisdiction. As we have pointed out, a person injured outside of California is in no event

entitled to claim the benefit of the law of California, other than its compensation act. Any right given by the law of the place where the injury occurs, can, if the action is transitory, be enforced in any state court where the parties may be found, and in the federal courts, under diversity of citizenship. Nothing in the California Workmen's Compensation Act can be construed as a prohibition upon the jurisdiction of the federal courts under diversity of citizenship to hear and determine transitory causes of action arising under the laws of other states. If such attempt were to be made by the California act, which it does not, it would be utterly void and nugatory, as no state can abridge the jurisdiction of the United States courts.

This leaves only the question of whether a nonresident injured outside or inside of California is debarred from the right to bring suit in the Federal courts upon the California Workmen's Compensation Act upon the ground of diversity of citizenship. This ground is correlative to that of whether a person sued before the California commission under the California Workmen's Compensation Act can remove the suit to the federal courts upon diversity of citizenship. This question has never yet come up for decision. The California act contains no prohibition of suits being had under it in the federal courts, and in all probability, if such attempt were made in the California law, it would be invalid and merely dropped from the act. Furthermore, as a matter of construction, if two constructions are possible, one that the legislature attempted to act outside its jurisdiction and to curtail the jurisdiction of the federal courts, and the other that the legislature did not so intend, but intended merely to make the compensation rem-

edy exclusive as against other remedies provided *by the law of the state only*, the latter construction should be adopted. Where one of two possible constructions would expose a statute to constitutional defects, and the other would save it, the construction should be taken which would save the statute.

Furthermore, a state can not prevent a nonresident plaintiff from suing in the United States courts upon diversity of citizenship, if such right would exist except for such state prohibition.

Cowels vs. *Mercer*, 7 Wall. 118, 122;
Lincoln vs. *Luning*, 133 U. S. 529;
Chicot Co. vs. *Sherwood*, 148 U. S. 529.

If there be an attempted deprivation of such right to sue in the United States courts, the attempt is void. Moreover, it is only the attempt to deprive which is void, and the right to sue in the United States courts upon the right of action can still be exercised.

Applying the foregoing principles to plaintiff-in-error's conclusions, it follows that a nonresident injured abroad, is not the subject of any discriminatory burden imposed by the operation of section 58 of the California Workmen's Compensation Act, if it be extended to include such nonresidents. He is, instead, the beneficiary of the extension of the protection of the California Workmen's Compensation Act to him, which amounts to a substantial advantage. He is not deprived by such extension of benefit of any "common-law rights" which he could otherwise claim in California. He is not prevented from suing in any court, state or federal, upon any rights which he may acquire under the laws of the state in which his injury occurs. If he be entitled to sue under the California act in the United States

courts, except for some implied prohibition contained in such act, we claim that such implied prohibition does not exist, and if it did, it would not be valid to prevent such suit in the federal courts.

At the worst, section 58 merely extends to nonresidents injured outside of California, the benefits of the California Workmen's Compensation Act upon the same terms and conditions, and subject to the same limitations, as are contained in said act with reference to residents of the state. Nonresidents are placed upon a position of exact equality with residents. This cannot amount to a discriminatory burden against nonresidents within the doctrine of *Estate of Johnson, supra.*

It also follows that section 58, as extended to nonresidents, does not involve a violation of article IV, section 2 of the United States Constitution, as it does not, in any aspect of the case, place nonresidents at a disadvantage as compared to residents under the provisions of the Workmen's Compensation Act. It is not a violation of article IV, section 2, to treat residents and nonresidents upon terms of equality. This constitutional provision does not permit a citizen going into another state to claim any greater privileges than are given residents in that state.

Detroit vs. *Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260, 262.

The point here under discussion was not raised in the court below, and is here presented for the first time. The constitutional issues raised in the court below, and the assignment of errors made herein, limit the attack upon section 58 to the grounds of alleged repugnance to article IV, section 2, and to the "equal protection of the laws" clause of the Four-

teenth amendment. Hence the question of possible interference with the right to sue in the federal courts can be considered only as it bears upon either of the constitutional provisions assigned, and cannot now be urged for the first time as an independent ground of attack under some other constitutional provision.

We have pointed out, however, in this connection, that the California Workmen's Compensation Act does not attempt or purport to prevent suit in the United States courts upon diversity of citizenship. It purports only to give an exclusive remedy, exclusive as to all other rights or remedies existing under the state law, only. Beyond that, the state legislature presumably cannot act, and has not attempted to act. If it had attempted to limit the jurisdiction of the United States courts, such limitation would be nugatory, and fall to the ground, leaving nonresidents entitled to recourse in any event to the federal courts, at their pleasure.

III.

SECTION 56 OF THE CALIFORNIA WORKMEN'S COMPENSATION ACT DOES NOT CONTRAVENE ARTICLE IV, SECTION 2, OF THE CONSTITUTION OF THE UNITED STATES.

If the court has not already disposed of this case on either of the two preceding grounds, we are brought to the consideration of the merits of the contention of unconstitutionality. Upon the merits we assert and believe that there is no conflict between the statutory provision in question and the federal constitution, for the following reasons:

1. Article IV, section 2, does not apply to privileges which the state cannot constitutionally grant to nonresidents or noncitizens. The legislative power of California does not constitutionally extend to the protection of nonresidents injured outside the state.

2. Article IV, section 2, applies only to privileges which are to be enjoyed by citizens of other states within the state creating such privileges. It does not apply to a privilege to be enjoyed solely outside the state of its creation, such as the privilege of extraterritorial effect of its statutes.

3. Article IV, section 2, does not prevent the states from making reasonable classifications. The differentiation between residents and nonresidents contained in the provision under attack, is a reasonable classification.

Considering the foregoing points *seriatim*:

A. ARTICLE IV, SECTION 2, DOES NOT APPLY TO PRIVILEGES WHICH THE STATE CAN NOT CONSTITUTIONALLY GRANT TO NONRESIDENTS. THE LEGISLATIVE POWER OF CALIFORNIA DOES NOT CONSTITUTIONALLY EXTEND TO THE PROTECTION OF NONRESIDENTS INJURED OUTSIDE THE STATE.

If the State of California cannot validly protect by its workmen's compensation act residents of other states injured in Alaska, then article IV, section 2, of the federal constitution does not invalidate the section under attack for failure to attempt to give such protection.

(*a*) It has been held that a discrimination against a certain class does not render the statute unconstitutional where the legislature could not validly extend the privileges of the statute to such class. The constitution does not obligate a state to do what it cannot constitutionally do, or penalize it for failure to do so.

Brown-Forman Co. vs. *Kentucky*, 217 U. S. 563, 54 L. Ed. 883;

Dolley vs. *Abilene* (C. C. A. 8th Cir.), 179 Fed. 461;

Commonwealth vs. *Milton*, 51 Ky. R., 12 B. Mon. 212, 54 A. D. 522.

It stands to reason that if the state cannot in any event give to citizens of other states the privilege contended for, a citizen of another state cannot claim that he is deprived of any right guaranteed him by article IV, section 2.

(*b*) A state is limited, in giving extraterritorial force to its statutes, to the protection of its own citizens and residents abroad. It cannot, by the positive force of its own statute, affect transactions occurring outside its boundaries, between persons not its citizens or residents.

The Apollon, 9 Wheat. (22 U. S.) 361, 6 L. Ed. 111;

Rose vs. *Himely*, 4 Cranch (8 U. S.) 240, 279, 2 L. Ed. 608;

North Alaska Salmon Co. vs. *Pillsbury et al.*, 174 Cal. 1, 162 Pac. 93;

Whitford vs. *The Panama R. R. Co.*, 23 N. Y. 465, 470;
People vs. *Tyler*, 7 Mich. 160;
Commonwealth vs. *Gaines*, 2 Va. Cases 172.

See also:

1 Bishop Criminal Law, Sec. 121;
Wharton Criminal Law, 11th ed., sections 316, 322;
Wharton Digest International Law, 2d ed., Sec. 9.

See also an article written by Mr. Justice Brewer in 22 Cyc. 1718, 1732.

The status of the United States Consular Court at Shanghai, China, is discussed in *In re Ross*, 140 U. S. 453, 35 L. Ed. 581.

The same rule is recognized in England.

Rex vs. *Sawyer*, 2 C. & K. 101;
King vs. *Depardo*, 1 Taunt. 26;
Rex vs. *Helsham*, 4 C. & P. 394;
Rex vs. *Mattos*, 7 C. & P. 458;
Regina vs. *Serva*, 2 C. & K. 53.

We quote from a decision of this court describing the English rule as follows:

"We are not unmindful that the English Courts of Admiralty have ruled that a foreigner cannot set up against a British vessel, with which his ship has collided, that the British vessel violated the British Mercantile Marine Act, on the high seas, for the reason, as given, that the foreigner was not bound by it, inasmuch as it is beyond the power of Parliament to make rules

applicable to foreign vessels outside of British waters. This decision was made in 1856, in the case of *The Zollverein,* 1 Swab. 96. A similar rule was asserted also in *The Dumfries,* (1 Swab. 63) decided the same year; in *The Saxonia* (1 Lush. 410) decided in the High Court of Admiralty in 1858 and by the Privy Council in 1862. The same doctrine was laid down in 1858, in the case of *Cope* vs. *Doherty* (4 Kay and J. 367; 2 De Gex and Jones 626), and in The Chancellor (4 Law Times M. S. 627), decided in 1861."

The Scotia, 14 Wall. (81 U. S.) 170, 20 L. Ed. 822, 825.

The rule that the statutes of a state are not enforceable beyond its boundaries, except as to its own citizens or residents, is more than a rule of comity sanctioned by international law. If it were only a rule of comity, state statutes would not be held void for exceeding it. The only result would be that other states would decline to recognize rights created under them, leaving such statutes in force in the state of their enactment. But in the following cases state statutes have been held *unconstitutional* in the state of their enactment because the state endeavored to give extraterritorial effect to them beyond the limitation here discussed:

Brown-Forman Co. vs. *Ky.,* 217 U. S. 563, 54 L. Ed. 883;

Riverside Mills vs. *Menefee,* 237 U. S. 189, 59 L. Ed. 910;

N. Y. Life Ins. Co. vs. *Head,* 234 U. S. 149, 58 L. Ed. 1259;
State Tax on Foreign Held Bonds, 15 Wall. (82 U. S.) 300, 21 L. Ed. 179;
State vs. *Clark* (Mo.), 76 S. W. 1007;
The Scotia, 81 U. S. 170;
Worthington vs. *District Court* (Nev.) 142 Pac. 230;
State vs. *Ray* (N. C.), 66 S. E. 204;
Union Nat. Bank vs. *Chicago,* Fed. Cas. 14374;
State vs. *Knight,* 1799, 1 N. C. 44;
State vs. *Carter,* 27 N. J. L. 499;
People vs. *Price,* 250 Ill. 109, 95 N. E. 68;
State vs. *L. & N. Ry. Co.* 177 Ind. 553, 96 N. E. 340;
Adams vs. *Dick,* 170 N. Y. S. 17;
De Brimont vs. *Penniman,* 10 Blatch. 436.

The rule is therefore a positive limitation upon state legislative power.

(*c*) The underlying theory which justifies extra-territorial effect of statutes has not been clearly stated by the courts. We conceive that such power in a state rests upon one or more of the following legal principles:

1. As a power inherent in sovereignty. A state may protect its own citizens or residents while abroad, but its extraterritorial force is limited to the protection of, or imposition of duties upon, its own citizens or subjects.

The authorities cited above establish both the power and the limitation.

2. As a power inherent in the police power of the state. A state may protect its citizens and its common weal against the unfortunate consequences of industrial injuries. (*N. Y. Cent. R. R. Co.* vs. *White*, 243 U. S. 188, 61 L. Ed. 667). The harm to the state and its citizens and residents is approximately the same where the injury occurs outside the state as inside, so long as the injured employee or his dependents reside within the state during their period of adversity following the injury.

If the power of a state to give extraterritorial force to its workmen's compensation act is based upon its police power to protect its own citizens and welfare, then such power is also limited by the police power and cannot be extended beyond it, to cases where its citizens and welfare are in no way affected. The protection of citizens of New York against injuries sustained by them while employed in Alaska, cannot be referred to the police power of California. The injured New Yorker will in all probability return to his own state after the injury, or will leave widow or orphans in his own state. Certainly there is no presumption that residents of New York or any other state, injured in Alaska, will affect the interests of California. The police power, therefore, would not justify the extension of section 58 of the California law, to the protection of nonresidents injured abroad. See

In re Fowles 89 Kan. 430, 131 Pac. 598;
Hanks vs. *State*, 13 Tex. Ct. App. R. 289.

3. Extraterritorial power may also be based upon legislative jurisdiction over a status.

> "All taxes, therefore, must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of persons nor property, the imposition of a tax would be *ultra vires* and void. *Jurisdiction is as necessary to valid legislation as to valid judicial action.*" (Italics ours.)
>
> *Union National Bank* vs. *Chicago,* Fed. Cas. 14374.

To the same effect see *Brown-Forman Co.* vs. *Ky.,* 217 U. S. 563, 54 L. Ed. 883.

The obligation imposed by the California workmen's compensation act is a statutory addition to the duties imposed by law upon the status or relationship of master and servant and not an obligation sounding in contract. It has been so construed by the California Supreme Court in *North Alaska Salmon Co.* vs. *Pillsbury et al.,* 174 Cal. 1, 162 Pac. 93.

Since the obligation of the California act has been determined by the Supreme Court of California to rest upon a positive statute imposing additional incidents upon the relationship of master and servant, by the force of the statute and not by the implied contract or consent of the parties, it follows that such relationship must itself have a *situs* within the State of California, or section 58 cannot validly determine its incidents. Such *situs* is necessarily determined

by domicile or residence, as with all other relationships. Jurisdiction over marriage for purpose of divorce, over guardian and ward, parent and child, and necessarily also over master and servant, is based upon domicile or residence. Hence where a *non-resident of* California is injured while working in Alaska, the legislature of California has no power to determine the rights and duties between such employee and his employer, as the *situs* of the status is not within its jurisdiction.

The California Supreme Court seems to have been led away from this conclusion because of the fact that under section 58 of the California law the contract of hire must have been made in California, as well as the employee be resident therein, to enable the California act to apply extraterritorially. It is sufficient to say that jurisdiction over the status of master and servant is conferred by the *residence of the parties at the time of the injury,* not by the fact that the status was originally created in California. The place of the original creation of the status has nothing to do with it, unless the obligation sought to be imposed sounds in contract, which it does not in California.

North Alaska Salmon Co. vs. *Pillsbury et al.,* 174 Cal. 1, *supra.*

In the following workmen's compensation cases it is held that the law of the state in which the business is carried on or the parties are resident, applies, and not the law of the state where the contract of hire was originally made.

Smith vs. *Heine Safety Boiler Co.*, 224 N. Y. 9;
Gardiner vs. *Horseheads Construction Co.*, 156 N. Y. S. 899;
Perlis vs. *Lederer*, 178 N. Y. S. 449;
Barnhart vs. *American Concrete Steel Co.* (N. Y.), 125 N. E. 675.

Coupling the decision of the California Supreme Court, that the obligation of the California Workmen's Compensation Act is an affirmative statutory duty and does not sound in contract, with the decisions from New York, cited above, (the New York Workmen's Compensation Act being a compulsory measure on all fours with that of California) it follows that the place of the original making of the contract of employment is without legal significance. The duty to compensate is affixed to the status at the moment of the injury and the status must therefore at such moment be within the jurisdiction of the state whose law is sought to be applied.

The result is that upon all possible theories sustaining the power to give extraterritorial force to a state workmen's compensation act, such power is limited to the protection of residents abroad of the state whose law is sought to be applied.

Such being the case, the State of California could not give the benefits of section 58 to nonresidents, and as article IV, section 2, of the federal constitution does not change this result, it necessarily does not invalidate section 58 for failure to do the impossible.

B. ARTICLE IV, SECTION 2, APPLIES ONLY TO PRIVILEGES WHICH ARE TO BE ENJOYED WITHIN THE STATE CREATING SUCH PRIVILEGES.

This has been held in the following cases:

Blake vs. *McClung*, 172 U. S. 239, 256, 43 L. Ed. 432, 439;

Conner vs. *Elliott*, 18 How. (U. S.) 591;

McCarter vs. *Hudson County Water Co.*, 70 N. J. Eq. 696, 65 A. 489 at 493.

In *Blake* vs. *McClung*, 172 U. S. 239, *supra*, this court said:

> "The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage *when he is within or when he removes to another state, or when asserting in another state* the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established." (Italics ours).

In *Conner* vs. *Elliott*, 18 How. (59 U. S.) 591, 15 L. Ed. 497, this court held:

> "Such discrimination has no connection with the clause in the constitution now in question (Art. IV, Sec. 2). If a law of Louisiana were to give to the partners *inter sese* certain peculiar rights, *provided they should reside within the state, and carry on the partnership trade there*, we think it could not be maintained that all copartners, citizens of the United States, residing

and doing business elsewhere, must have those peculiar rights by force of the constitution of the United States, any more than it could be maintained that, because the law of Louisiana gives certain damages on protested bills of exchange, drawn or indorsed within that state, the same damages must be recoverable on bills drawn elsewhere in favor of citizens of the United States."

In *McCarter* vs. *Hudson County Water Company*, 70 N. J. Eq. 696, 65 A. 489, 492, *supra*, it was held by the New Jersey Court:

"Certainly it is not within the intendment of the constitutional clause" (referring to article IV, section 2) "that citizens of New York, while resident there, shall have all the privileges that they would enjoy if residents within our borders."

C. ARTICLE IV, SECTION 2, DOES NOT PREVENT THE STATES FROM MAKING REASONABLE CLASSIFICATIONS. THE DIFFERENTIATION BETWEEN RESIDENTS AND NON-RESIDENTS CONTAINED IN THE PROVISION UNDER ATTACK, IS A REASONABLE CLASSIFICATION.

Article IV, section 2, does not prevent reasonable classification based upon residence.

Blake vs. *McClung*, 172 U. S. 239, 43 L. Ed. 432;
Travelers Insurance Co. vs. *Connecticut*, 185 U. S. 364, 46 L. Ed. 949;
Travis vs. *Yale & Towne Mfg. Co.*, 40 S. Ct. R. 228;
LaTourette vs. *McMaster*, 248 U. S. 465;
Shaffer vs. *Carter*, 40 S. Ct. R. 221;
McCready vs. *Virginia*, 94 U. S. 391, 24 L. Ed. 248.

Section 58 of the California Workmen's Compensation Act is based upon a reasonable classification, established by one or more of the following considerations:

1. The State of California having no jurisdiction to protect nonresidents of California injured outside of California, is clearly reasonable in refraining from the enactment of an unconstitutional statute attempting to provide such regulation.

2. The State of California has no interest in protecting residents of New York who are injured in Alaska. New York can protect its own citizens and residents injured abroad, and Alaska can also give the same protection. Injuries to nonresident employees abroad do not affect the property or interests of California or her citizens.

3. If each state were to attempt to protect all the residents of all other states injured outside of the state conferring the protection, the conflict of laws and jurisdiction would become intolerable. The exercise of extraterritorial jurisdiction must be restricted by each state to prevent unnecessary conflicts of laws.

In re Fowles, 89 Kan. 430, 131 Pac. 598.

4. The object of the California Workmen's Compensation Act is to compel California industry to bear its fair share of the burden thrown upon the State of California by the killing and wounding of workmen in industry. (*Western Indemnity Co.* vs. *Pillsbury et al.*, 170 Cal. 686, 151 Pac. 398.) To fully attain this object it is necessary that California industry remain subject to the same burden where

California employees in the course of its operation are injured while temporarily outside the state. It is no part of this object that California should protect Nevada or its citizens against the killed and injured of Nevada industry outside the state becoming a burden upon Nevada. It would, in fact, be an invasion of the soverignty of Nevada and outside the police power of California for California to officiously intermeddle in the public affairs of Nevada in this manner.

In the last analysis, the reasonableness of section 58 turns upon the difference between intraterritorial and extraterritorial legislation. The resident of any state of the United States *injured in California* is entitled to the benefits of the California compensation act upon the same terms as residents of California, under article IV, section 2, of the Federal Constitution. But for injuries occurring outside of California the California Workmen's Compensation Act should apply only to the protection of California residents or to the advancement of California welfare, and not further. As to injuries occurring in the Territory of Alaska, every state can protect its own residents working in Alaska, and Alaska may also legislate upon the subject. It is not necessary or reasonable for Oregon to legislate concerning the employment of Californians in Alaska, or for California to legislate concerning the employment of Oregonians in Alaska.

IV.

THE PROVISIONS OF SECTION 58 DO NOT VIOLATE THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT.

The provisions of the United States constitution here invoked by plaintiff-in-error is as follows:

> "* * * no state shall make or enforce any law which shall abridge * * *, nor deny to any *person within its jurisdiction*, the equal protection of the laws." (Italics ours.)

Obviously this provision has no application to section 58 of the California Workmen's Compensation Act.

A. THE EQUAL PROTECTION OF THE LAWS IS GUARANTEED BY THE FOURTEENTH AMENDMENT ONLY TO PERSONS "WITHIN ITS JURISDICTION," I.E., WITHIN THE JURISDICTION OF THE STATE IN QUESTION.

This is so clear from the language of the Fourteenth Amendment that citation of authorities is unnecessary. See, however:

National Mercantile Co. vs. *Matson*, 45 Utah 159, 143 Pac. 223.

A resident of New York injured in Alaska is not at the moment of his injury in Alaska within the jurisdiction of the State of California. California is not required to give equality of treatment under its laws to him. It is only required to give equal protection of the laws where the injury occurs within the State of California. The constitutional

provision refers only to intraterritorial effect of statutes, not to their extraterritorial effect. The reason is obvious. Extraterritorial jurisdiction of a state, as a matter of constitutional and international law, is not exercised except for the protection of citizens or residents, or to protect the state itself from harm.

An attempt was made below to evade this conclusion by stating that the right to sue under the California Workmen's Compensation Act could be exercised in California by a nonresident by his going to that state to institute proceedings before the California Industrial Accident Commission. From this premise, the conclusion was reached that a nonresident in California could not be debarred from the right to institute proceedings within the state upon equal terms with residents. This contention overlooks the distinction between *rights* and *remedies*. A suit can not be brought unless there be a cause of action, *i. e.*, a breach of a legal right, prior to the institution of the suit. In the situation under discussion the *right* exists while the employee is working in Alaska, and the breach of that right occurs *at the moment of his injury in Alaska*. At the time the right accrues the person is not within the jurisdiction of the State of California. If a citizen of New York injured in Alaska does not acquire, while in Alaska, a right to benefits under the California Workmen's Compensation Act, there is nothing left upon which he can bring suit in California. Hence his exclusion from the California Workmen's

Compensation tribunal is not due to any denial to him of the equal protection of the laws while in California, but to the fact that a cause of action in his favor under the California Compensation Act did not arise upon his injury abroad.

Again, the language of the Fourteenth Amendment refers to jurisdiction of the person. The clause reads:

> "* * * deprive *any person* within its jurisdiction of the equal protection of the laws."

This clearly means that the *person* must be within the state at the time his cause of action arises, to claim the benefits of this portion of the Fourteenth Amendment.

B. THE CONTENTIONS MADE IN THE PRECEDING PORTION OF THIS BRIEF WITH RESPECT TO THE "PRIVILEGES AND IMMUNITIES" CLAUSE OF THE CONSTITUTION (ARTICLE IV, SECTION 2) APPLY, IN THE MAIN, WITH EQUAL FORCE TO THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT.

To avoid unnecessary repetition we will merely summarize those points at this time, showing their applicability to the Fourteenth Amendment. They are:

1. An employer, not being a member of the class discriminated against, can not raise the constitutional point.

The contentions heretofore made under this heading on pp. 14 to 23 of our brief with respect to the privileges and immunities clause, apply with

equal force here. The rule that a person whose constitutional rights are not invaded by an alleged discrimination can not raise the point, applies to all constitutional questions involving discriminaton.

2. If section 58 of the California Workmen's Compensation Act violates article IV, section 2, of the federal constitution, the effect of such violation is to extend the privileges of section 58 to citizens and residents of other states.

If our contentions on this point are accepted by the court with reference to article IV, section 2, no further question can arise with respect to the "equal protection of the laws" clause of the Fourteenth Amendment. If nonresidents, by the force of article IV, section 2, enjoy the same privileges as residents under section 58, no discrimination remains upon which the Fourteenth Amendment can be invoked.

Our argument upon this contention is found on pp. 24 to 33 of this brief.

3. If section 58 of the California Workmen's Compensation Act does not violate the privileges and immunities clause, it necessarily does not violate the "equal protection of the laws" clause. This is for the reason that the purpose and effect of both constitutional provisions is the same, *i. e.*, to strike down unlawful discriminations against certain classes of persons. The only class alleged to be discriminated against in the present case is nonresidents of the State of California; hence, the question of discrimination is the same under either constitutional provision. See pp. 24 to 44 of this brief for the argu-

ment upon this question. We there contend:

(*a*) The "privileges and immunities" clause only applies to privileges and immunities which can be enjoyed within the state of their creation. Similarly, the "equal protection of the laws" clause applies only to protection which can be enjoyed *within the jurisdiction* of the state enacting such laws.

(*b*) The State of California having no power to protect residents of other states injured outside of California, does not act unreasonably in declining to give such protection.

Naturally, if a state merely recognizes and regards the limits of its own power, the mere fact that it finds certain classes of persons outside the limits of its power does not constitute an unreasonable and unconstitutional discrimination against such persons. This is as true of the Fourteenth Amendment as it is of article IV, section 2. (See pp. 44 to 54 preceding of this brief.)

(*c*) The "equal protection of the laws" clause does not prohibit reasonable classification under the police power of the state.

Jeffery Mfg. Co. vs. *Blagg* 235 U. S. 571, 576, 59 L. Ed. 364, 369;

Travelers Ins. Co. vs. *Connecticut,* 185 U. S. 364;

Brown-Forman Co. vs. *Kentucky,* 217 U. S. 563, 54 L. Ed. 883;

Magoun vs. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.

The following is quoted from *Magoun* vs. *Illinois Trust & Savings Bank, supra,* speaking of the Fourteenth Amendment:

> "*It does not prohibit legislation which is limited either* in the objects to which it is directed, *or by the territory within which it is to operate.* It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." (Italics ours.)

The classification contained under section 58 of the California act is reasonable.

This contention is covered by what we have said in this brief pp. 55 to 58 with respect to reasonableness of the classification under article IV, section 2 of the constitution.

SUMMARY.

We therefore contend that the judgment below should be affirmed by this court for the following reasons:

1. The plaintiff-in-error, as an employer, is not entitled to raise either of the constitutional objections presented.

2. If section 8 of the California Workmen's Compensation Act violates article IV, section 2, the effect of such violation is to extend the benefits of the California Workmen's Compensation Act to nonresident employees injured extraterritorially, and thus to validate the section as applied to residents of California,

as in the present case; with this construction of article IV, section 2 of the constitution, the question of discrimination is removed and the "equal protection of the laws" clause of the Fourteenth Amendment also becomes inapplicable.

3. Section 58 of the California act does not violate article IV, section 2, of the United States constitution:

(*a*) The legislative power of California does not extend to the protection of residents of other states injured in Alaska, and the failure of California to attempt an invalid extension of the benefits of its workmen's compensation act to nonresidents does not constitute a violation of article IV, section 2;

(*b*) Article IV, section 2, does not apply to privileges granted by a state to be enjoyed extraterritorially;

(*c*) Article IV, section 2, does not prohibit reasonable discrimination between residents and nonresidents, and the discrimination in the present case is reasonable.

4. Section 58 of the California act does not violate the "equal protection of the laws" clause of the Fourteenth Amendment:

(*a*) The "equal protection of the laws" clause applies only to privileges to be enjoyed within the state granting such privileges;

(*b*) The contentions made above with respect to

article IV, section 2, of the constitution are equally applicable to the clause of the Fourteenth Amendment herein invoked.

Respectfully submitted.

WARREN E. PILLSBURY,
Counsel for Defendant-in-Error
Industrial Accident Commission,
State of California.

EXHIBIT A.

OPINION OF THE SUPREME COURT OF CALIFORNIA IN ESTABROOK STEAMSHIP COMPANY AND KLAMATH STEAMSHIP COMPANY VS. INDUSTRIAL ACCIDENT COMMISSION, 177 CAL. 767, 177 PAC. 848.

A. F. ESTABROOK CO. VS. INDUSTRIAL ACCIDENT COMMISSION; KLAMATH S. S. CO. VS. INDUSTRIAL ACCIDENT COMMISSION.

SLOSS, J.: In *North Alaska Salmon Co.* vs. *Pillsbury*, 174 Cal. 1 (162 Pac. 93), we held that the Workmen's Compensation, Insurance and Safety Act, as originally enacted, did not authorize an award of compensation where injury to the employee had occurred beyond the boundaries of this state. The question decided was simply one of interpretation. It was assumed that the legislature had power to require employers to compensate "injured employees whose employment was created in this state, regardless of the place where the injury may have been sustained." The language of the statute, as read by the court, indicated, however, that the legislature had not intended to make the compensation scheme applicable to cases of injury arising outside the state.

In 1915 the scope of the act was extended by the addition of a new section (75*a*), reading as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state

at the time of the injury and the contract of hire was made in this state and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1915, p. 1101.)

We have before us, in each of the above-entitled proceedings, a writ of *certiorari* issued on behalf of the employer to test the validity of an award made pursuant to the terms of this section. The two proceedings are presented on a single set of briefs.

The petitioners do not question the existence of the general legislative power which, in our opinion in the North Alaska Salmon Company case, we assumed to exist. The sole ground of attack is that section 75*a* involves an unjustifiable discrimination against employees who are not residents of this state, and thus violates the provision of the constitution of the United States declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (Art. IV, Sec. 2), and that prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws" (Amdt. XIV, Sec. 1). Under settled principles of constitutional law, the petitioners are not in a position to raise this question. Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operation of the statute. (12 C. J. 760; *Scheerer & Co.* vs. *Deming*, 154 Cal. 138, 142, [97 Pac. 155].) More specifically, a contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons "may not be raised by one not belonging to the class alleged to be discriminated against." (12

C. J. 768; 10 Cent. Dig., col. 1284 *et seq.*; *Estate of Johnson*, 139 Cal. 532, 534, [96 Am. St. Rep. 161, 73 Pac. 424].) Thus, the validity of a statute excluding colored persons from serving on juries can not be questioned by whites. (*Commonwealth* vs. *Wright*, 79 Ky. 22, [42 Am. Rep. 203].) Nor may a male question the validity of a statute as discriminating against women. (*McKinney* vs. *State*, 3 Wyo. 719, [16 L. R. A. 710, 30 Pac. 293].) On like grounds, it has been held that a resident or citizen is not entitled to assail an act on the ground that it discriminates against those who are not residents or citizens. (*Bozeman* vs. *State*, 7 Ala. App. 151, [61 South. 604]; *Schmidt* vs. *Indianapolis*, 168 Ind. 631, [120 Am. St. Rep. 386, 14 L. R. A. (N. S.) 787, 80 N. E. 632]; *Gallup* vs. *Schmidt*, 154 Ind. 196, [56 N. E. 443]; *State* vs. *Kirby*, 34 S. D. 281, [148 N. W. 533].) Very directly in point is the decision of the Supreme Court of the United States in *Jeffrey Manufacturing Company* vs. *Blagg*, 235 U. S. 571, [59 L. Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570]. The validity of the workmen's compensation law of Ohio was there questioned. That law deprived a certain class of employers of five or more men of various defenses available to employers of less than five. The plaintiff-in-error, who was an employer of more than five, and within the class designated, assailed the legislation on the ground, among others, that the act discriminated unjustly against workmen in shops employing less than five men. The court held that this ground of attack was not available to the employer, saying (235 U. S. 576, [59 L. Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570]):

"Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employee in a shop with five employees, with those having less. No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, can not be decisive; for it is a well settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Ry. Co.* vs. *King*, 217 U. S. 524–534, [54 L. Ed. 868, 30 Sup. Ct. Rep. 594]; *Engel* vs. *O'Malley*, 219 U. S. 128, 135, [55 L. Ed. 128, 31 Sup. Ct. Rep. 190]; *Standard Stock Food Co.* vs. *Wright*, 225 U. S. 540, 550, [56 L. Ed. 1197, 32 Sup. Ct. Rep. 784]; *Yazoo & M. Valley R. R. Co.* vs. *Jackson Vinegar Co.*, 226 U. S. 217, 219, [57 L. Ed. 193, 33 Sup. Ct. Rep. 40]; *Rosenthal* vs. *N. Y.*, 226 U. S. 260, 271, [Ann. Cas. 1914 B, 71, 57 L. Ed. 212, 33 Sup. Ct. Rep. 27]; *Darnell* vs. *Indiana*, 226 U. S. 390, 398, [57 L. Ed. 267, 33 Sup. Ct. Rep. 120]; *Plymouth Coal Co.* vs. *Pennsylvania*, 232 U. S. 531, 544, [58 L. Ed. 713, 34 Sup. Ct. Rep. 359]; *Missouri, Kansas & T. Ry. Co.* vs. *Cade*, 233 U. S. 642, 648, [58 L. Ed. 1135, 34 Sup. Ct. Rep. 678]."

This reasoning is decisive of the present case. If section 75*a* contains—we do not say it does— an unwarranted discrimination against nonresidents, the only persons entitled to attack the law on this ground are members of the class thus excluded from the benefits of the legislation. No constitutional right of the employer is invaded by the action of the legislature in subjecting him to a less extensive liability than might have been imposed. Not being required to pass

upon the constitutional question sought to be raised, we would not be justified in entering into a discussion of its merits.

Each of the awards is affirmed.

RICHARDS, J. *pro tem.*, WILBUR, J., MELVIN, J., VICTOR E. SHAW, J. *pro tem.*, and ANGELLOTTI, C. J., *concurred.*

Rehearing denied.

EXHIBIT B.

DISSENTING OPINION OF MR. JUSTICE WILBUR IN THE FIRST DECISION BELOW IN THE CASE AT BAR, QUONG HAM WAH COMPANY VS. INDUSTRIAL ACCIDENT COMMISSION, 59 CAL. DEC. 18, NOT ELSEWHERE REPORTED BECAUSE MAJORITY OPINION WAS REVERSED UPON REHEARING.

QUONG HAM WAH COMPANY, PETITIONERS, VS. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL., RESPONDENTS.

DISSENTING OPINION.

I dissent.

In March, 1918, this court by unanimous decision in bank, decided the identical point raised here. (*Estabrook* vs. *Ind. Acc. Comm.*, *Klamath Steamship Co.* vs. *Ind. Acc. Comm.*, 177 Cal. 767.) It is now proposed to squarely overrule that decision on the theory that in rendering it certain exceptions to the general rule relied upon were overlooked, and that the federal case therein particularly relied upon (*Jeffrey* vs. *Blagg*, 235 U. S. 571) also overlooked these exceptions, and that a subsequent decision by the Supreme Court of the United States (*Buchanan* vs. *Warley*, 245 U. S. 60) was based upon and recognized one of these exceptions, and to that extent modified the previous decision of the Supreme Court of the United States relied upon in the case of *Estabrook* vs. *Ind. Acc. Comm.*, *supra*. The general rule recognized in *Estabrook* vs. *Industrial Acc. Comm.*, and in the cases therein relied upon as authority for that decision, is that where the statute is complained of as being unconstitutional by reason of discrimination against a certain class, that persons other than mem-

bers of that class can not complain of the unconstitutionality of the law, for the reason that they are not hurt by the discrimination, and not for the reason that the person raising the question is not interested in or affected by the statute claimed to be unconstitutional. Of course, if it be said that every unconstitutional law is void and that every person affected thereby is therefore affected by void legislation, then it would be true that any person whose conduct is regulated by the statute would be to that extent entitled to complain of such invalidity. But this course of reasoning the Supreme Court of the United States has refused to follow, for the reason that the fundamental purpose of the fourteenth amendment to the constitution of the United States was to protect against discrimination, and it was therefore held that only those discriminated against could raise the question. The substantial effect of this line of decisions is that a law, although unconstitutional as to one class by reason of discrimination against that class, can be enforced as to all others, and in all cases except where the rights of those discriminated against are involved. A similar rule applies generally to constitutional questions. As was said by the Supreme Court of the United States in *Hatch* vs. *Reardon,* 204 U. S. 152, 160: "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstand-

ing the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." It is said that one of the exceptions to the rule stated is: "Where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality." This certainly is a strange doctrine—that a law is valid as to all classes except the class discriminated against, unless that class is precluded from making complaint, in which event the law is invalid as to every class. Such an exception overlooks the purpose of the rule, namely, to confine the complaint against such legislation to those who are injured by it, in the sense that they are deprived of a constitutional right to equal treatment. No decision of the United States Supreme Court called to our attention recognizes such an exception to the general rule.

It is held that there is an exception to the rule where the rights of the party raising the question of the constitutionality of the law are directly affected by the law. On this point *Buchanan* vs. *Warley, supra*, is cited as an evidence of this exception to the rule, and it is upon this theory that the majority of the court places its decision that the employer can complain that certain classes of employees are discriminated against. It should be noted that if this is an exception to the rule, then the exception is as broad as the rule, and if any such exception is established it practically overrules all those decisions maintaining and enforcing the rule that only those discriminated against can raise the constitutional question, for the exception is in effect

that *any one* injuriously affected by a decision that the law is constitutional can claim it is unconstitutional, even though not in the class discriminated against. In other words, anyone can claim the statute to be void if such a conclusion is to his advantage. An examination of the case of *Buchanan* vs. *Warley* shows that the facts there involved are so different from those requiring the application of the rule under discussion, that the rule was neither mentioned nor discussed. There a white man had sold real estate to a colored man, and in the contract it was provided that the latter would not be required to complete the purchase unless he was by law authorized to use the land purchased for a residence. The right of the plaintiff, although a white man, turned them upon the constitutionality of the ordinance, which in effect prohibited him from selling the land to a colored man for residence purposes. This invaded his right to dispose of his property. Although the colored man was seeking to sustain the validity of the ordinance and the white man to attack it, the very point involved in the controversy was the validity of that ordinance, and a member of the class discriminated against was before the court. The fact that the latter took the position that the law was constitutional did not alter the fact that a member of the class discriminated against was before the court. In a recent decision by the United States Supreme Court (*Middleton* vs. *Texas Power and Light Co.*, 39 S. C. R. 227, 249 U. S. 152), an employee claimed that the Workmen's Compensation Law of Texas violated the fourteenth amendment for the reason that it excluded from its operation "domestic servants, farm laborers", etc. The employee who was not in the excepted classes brought an action for damages against the employer.

The employer set up the provision of the Workmen's Compensation Act, providing an exclusive remedy for employees. There were two possible arguments: one, that the excepted class was discriminated against by being omitted from the act, and the other that the included employees were discriminated against by being included therein and thereby deprived of the usual legal remedies retained by the excepted class. In disposing of the matter the court held that the plaintiff could not be heard to complain that the *omitted class* was discriminated *against* by such omission; but that his claim that he was *discriminated against* by inclusion therein could be considered. Instead of claiming the benefit of the law he was seeking to escape its limitations, and as such was a person in a class discriminated against. The court said: "Of course plaintiff-in-error, not being an employee in any of the excepted classes, *would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act,*" (citing as authority for the statement the line of cases relied upon in *Estabrook* vs. *Industrial Accident Commission, supra,* including *Jeffrey Mfg. Co.* vs. *Blagg, supra*). "But plaintiff-in-error sets up *a grievance* as a member of a class to *which the act is made to apply.*" (Italics ours.) Surely there is no suggestion here that the employer could set up the discrimination to escape liability under the act, for in no case was it discriminated against. The claim considered by the court was that of a denial of the equal protection of the law, and is thus stated: "This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges *which by the act*

are denied to employees of the non-excepted classes, without reasonable basis for the distinction." (Italics ours.)

In a still later case (*Arizona Copper Co.* vs. *Hammer,* 39 Sup. Court Reporter, 553, 249 U. S. * * *), in an action involving the constitutionality of the Arizona Employers Liability Act, the court again relied upon *Jeffrey* vs. *Blagg, supra,* and *Middleton* vs. *Texas Light and Power Co., supra,* as authority for the proposition there advanced, namely, "To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: First, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs-in-error have no standing to raise the question," citing the authorities above mentioned. The point involved was that the statute applied only to hazardous occupations. A decision of the Supreme Court of the United States, not cited by Mr. Justice Sloss in the opinion in *Estabrook* vs. *Industrial Accident Commission,* is *Erie Ry. Co.* vs. *Williams,* 233 U. S. 685. It was there held, quoting from the syllabus: "An employer can not be heard to attack a state statute relating to payment of wages, *on the ground that it denies to some of his employees the equal protection of the law* because they are not within its protection." In that case the employer had as direct an interest in establishing the unconstitutionality of the law as he has in the case at bar, and yet it was held that he could not raise the question.

WILBUR, J.

EXHIBIT C.

OPINION OF SUPREME COURT OF CALIFORNIA IN ESTATE OF JOHNSON, 139 CAL. 532, 73 PAC. 424, 96 A. L. R. 161.

IN THE MATTER OF JACOB C. JOHNSON, DECEASED.

HENSHAW, J.: There are two appeals, the one taken by resident nephews and nieces, the other by nonresident nephews and nieces, citizens of sister states. Both are from the order of the court holding their respective distributive portions of the estate of the deceased liable for the payment of the collateral inheritance tax under the law as it stood in 1897. (Stats. 1897, p. 77.) So much of section 1 of that act as is necessary to this consideration is as follows: "after the passage of this act, all property which shall pass by will * * * other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, *and nieces or nephews when a resident of this state* * * * shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, * * * for the use of the state; * * * provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." The original act of 1893 (Stats. 1893, p. 193) is identical with the section as amended in 1897, saving for the italicized words above quoted, which are added by the amendment.

In the *Estate of Mahoney*, 133 Cal. 180, this amendatory clause was held to be in violation of the provisions of section 2 of article IV of the constitution of the United States, as well as of section 1978 of the Revised Statutes of the United States. It was

concluded that the amendment was void and should be stricken from the act, leaving the inheritances of all nephews and nieces liable for the tax as they were under the original act of 1893. Upon this present appeal we are asked to give further consideration to the question, and have done so, with the result that we have reached the conclusion that an erroneous construction was given to the law in the Mahoney case, and that an erroneous principle of constitutional interpretation was there announced.

In the Mahoney case the appealing nephews and nieces were not citizens of any state of the United States, but were aliens, and therefore had no right to raise the constitutional question of immunities and prerogatives pertaining solely to citizens of sister states. One who does not belong to the class that might be injured by a statute can not raise the question of its invalidity. (*Brown* vs. *Ohio Valley Ry. Co.*, 79 Fed. 176; *Red River Valley etc. Co.* vs. *Craig*, 181 U. S. 548; *United States* vs. *Moriarity*, 106 Fed. 886.) A court will not decide a constitutional question unless such construction is absolutely necessary; and in the Mahoney case, since the appellants were aliens, and claimed no protective rights as citizens, no constitutional question was involved. It would have been sufficient in disposing of their appeal to have said, as was said by the federal court in the case last cited, "When a nonresident of the states assails the constitutionality of a statute upon the ground that it denies to him a privilege granted to the citizens of this state, it will be time enough to consider the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law." As the Supreme Court of the United States has said in

Chicago Ry. Co. vs. *Wellman*, 143 U. S. 339, "But exercise of the power to declare the statute unconstitutional and void is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals." Still further, as hereinafter will be shown, the decision in the Mahoney case rested upon illegal assumptions of both appellants and respondent, and was therefore invited error. The appellants' first contention was, as expressed by the commissioner in the opinion in the Mahoney case, "That legacies to nephews and nieces are exempt from the collateral inheritance tax, whether they reside in this state or not." This contention was a claim that section 2 of article IV of the constitution of the United States secured not merely to citizens of other states the immunities and privileges granted by a state to its own citizens, but secured the same to aliens, to residents of territories, and to citizens of the United States who are not citizens of any state, none of which classes comes under the protecting shield of the constitution. The appellants' second contention in the Mahoney case was, that the court should strike out from the amendment the clause "when a resident of the state," upon the assumption that because it favored citizens of the state it was violative of the constitution of the United States, and therefore void. This assumption was admitted by respondents and accepted in the opinion, respondents contending merely that the clause "when a resident of the state" was inseparable from the amendment, and the court must strike out the whole amendatory clause, namely, "and nephews and nieces when a resident of the

state," and the opinion adopted the latter view, which was perfectly sound, upon the assumption that the exemption of resident nephews and nieces was in and of itself unconstitutional. But that such privilege or benefit conferred by a state upon its own citizens as expressed by this law, was not unconstitutional, we think is demonstrable upon principle as well as upon all abjudications.

Section 2 of article IV of the constitution of the United States declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." In this there is no striking down of or limitation upon the right of a state to confer such immunities and privileges upon its own citizens as it may deem fit. The clause of the constitution under consideration is protective merely, not destructive, nor yet even restrictive. Over and over again has the highest court of the United States so construed this provision. Thus in the Slaughter House Cases (16 Wall. 36) it is said:

> "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

(See, also, *Blake* vs. *McClung*, 172 U. S. 165; *Ward* vs. *Maryland*, 12 Wall. 418.) It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory.

It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, "No citizen of any state shall be granted any immunity not granted to every citizen of every state," or had it begun its declaration by saying that "It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state," it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. Thus it is expressed by Mr. Justice Harlan, in *Blake* vs. *McClung*, 172 U. S. 165; "The object of the constitutional guaranty was to *confer* on the citizens of the several states a general citizenship, and to *communicate* all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances * * *. These principles have not been modified by any subsequent decision of this court." Here, then, in precise terms, and from the highest court of our land, charged with

the duty of construing our governmental law, it is declared that the purpose of the constitutional guaranty is to *confer* and *communicate* all privileges which may thus be granted by a state to its own citizens, a rule of construction obviously radically different from that which would strike down an immunity granted by a state to its own citizens, because in terms such immunity had not been conferred upon citizens of all the states. It is unnecessary that a statute should so expressly provide. The constitution itself becomes a part of the law.

And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing. Thus in Vermont, where a statute exempted certain personal property of residents, but did not so exempt the like property of nonresidents, the tax upon the latter, not the exemption upon the former, was adjudged void, so that nonresidents should enjoy the equal right of exemption. (*Sprague* vs. *Fletcher*, 69 Vt. 69.) And in Massachusetts, where the state law required every corporation to retain and pay to the state one-fifteenth of all dividends payable to stockholders residing outside the state, the Supreme Court of Massachusetts in like manner adjudged the burden void, and extended the exemption to all citizens of sister states. (*Oliver* vs. *Washington Mills*, 11 Allen, 268.) And by the Supreme Court of Alabama the section of the statute imposing a tax upon slaves belonging to residents of other states higher than that im-

posed upon slaves belonging to citizens of the state was adjudged void only as to the burden. And for further instances reference may be made to *Wiley* vs. *Palmer*, 14 Ala. 627; *Fechcimer* vs. *City of Louisville*, 84 Ky. 306; *McGuire* vs. *Tax Collector*, 32 La. Ann. 832; *State ex rel. Hoadley* vs. *Board Ins. Com.*, 37 Fla. 564; *Roby* vs. *Smith*, 131 Ind. 342; *Shirk* vs. *LaFayette*, 52 Fed. 857; *Black* vs. *Seal*, 6 Houst. 541; *Davis* vs. *Pierse*, 7 Minn. 13; *Blake* vs. *McClung*, 172 U. S. 165. In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void. This is a most vital distinction, which is lost sight of in the Mahoney case. Thus the last expression of the legislative will in the amendment of 1897 was to confer an exemption upon citizens of the state of California—a particular class—nephews and nieces. It was the legislative design, clearly expressed, that their property should not be subjected to the burden of the tax, and yet by that decision upon their property is imposed a burden which the legislature not only meant should not be imposed, but from which it expressly declared that the property should be exempted. The result

is the judicial creation and imposition of a burden—a tax—in forthright violation of the declared legislative intent. This a court will never do. It is for the legislature alone to impose burdens by way of taxation. It is never the province or prerogative of a court. The holding in the Mahoney case, striking out the amendment of 1897, imposes a special tax upon citizens of this state, not by legislative enactment, but in the teeth of the express legislative prohibition. It is a canon of construction that an act of the legislature will yield to the constitution so far as necessary, but no further. (*Scott* vs. *Flower*, 61 Neb. 620.) The constitutional immunity goes only to citizens of sister states, and there is a clear distinction thus recognized between citizens of the states and citizens of the United States who are not citizens of any state, as well as citizens of alien states. (*Murray* vs. *McCarty*, 2 Munf. 393.) By virtue of the constitution of the United States, the immunity which the legislature by the amendment of 1897 conferred upon citizens of this state is extended to citizens of sister states, but the immunity goes no further. Citizens of territories, of the District of Columbia, and of our new possessions, as well as aliens, are not exempted, and their property is thus liable for the tax.

The case of *Sprague* vs. *Thompson*, 118 U. S. 90, cited in the opinion in the Mahoney case, is expressly in point upon this question. There the act of Georgia provided that shipmasters of all vessels bearing toward the ports of Georgia, excepting coasters of the state, etc., refusing to accept a pilot, shall be liable to pay, etc. The manifest and express design of this law was to impose a burden upon all vessels entering the ports of Georgia, excepting those

owned by its citizens. It came in direct conflict with section 4237 of the Revised Statutes of the United States. That section was enacted in exercise of the commerce power of Congress, and provides that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage between vessels sailing between ports of one state and vessels sailing between ports of different states, or any discrimination, * * * and all existing regulations or provisions making any such discriminations are annulled and abrogated." Those provisions had to do wholly with the commercial relations existing between states. Section 4237 prohibited the enactment of statutes of a certain description, and provided that by their terms they must not discriminate in the particulars mentioned. Herein there was no question of conferring benefits. It was the question of imposing illegal exactions, and the supreme court of the United States declared that the effort of the state of Georgia so to do was void. Up to this point the decision could have been taken for granted. The law was plain, almost commonplace, but in the argument an attempt was made to have the supreme court uphold the whole law by striking out the exception, and this it refused to do upon the ground not that they were not separable, but that in eliminating the exception a burden was imposed upon a class, when the legislature never had intended to impose it. In this sense the provisions were inseparable, and the whole section was annulled. In the case at bar we have the expression of the legislative intent to confer a certain immunity upon citizens of this state. By force of the constitution of the United States, that immunity is extended to all

citizens of sister states, leaving, as liable for the burden of the tax, the property of all other nephews and nieces, aliens and citizens of the United States, who are not citizens of any particular state.

The order is therefore reversed, with directions to the court to enter its order in conformity with the foregoing views.

SHAW, J., ANGELLOTTI, J., MCFARLAND, J., VAN DYKE, J., and LORIGAN, J., *concurred.*

DISSENTING OPINION.

BEATTY, C. J., *dissenting*: I dissent. The Mahoney case (133 Cal. 180), which is overruled by the present decision, was, in my opinion, correctly decided. It may be that the reasoning of the opinion in the former case was somewhat inconclusive, but I think the reasoning of the present opinion is quite as unsatisfactory. My own view of the case may be very briefly stated. There was a law—the act of 1893—of undoubted validity which imposed an inheritance tax upon the distributive shares of all nieces and nephews. That law could not be repealed by an unconstitutional act; and if the act of 1897 is unconstitutional, as held in the Mahoney case, the law of 1893 is still in force. Was the act of 1897 unconstitutional? I do not hold that it was unconstitutional because in conflict with the constitution of the United States; for I concede that where a state, by a law free from any conflict with its own constitution, confers a right or immunity upon its own citizens, the sole effect of the constitution of the United States is to make the citizens of other states equal participants in the same right or immunity. But if an act is in conflict with the state constitution, it confers no right or immunity upon the citizens of the state, and there

is nothing for the constitution of the United States to operate upon. This, in my opinion, is the proposition which has been overlooked in the present case, as it was in the Mahoney case. To my mind, the act of 1897 is plainly in conflict with the constitution of California.

* * * * * * *

In the opinion of the court it is said that the result of holding the act of 1897 unconstitutional "is the judicial creation and imposition of a burden—a tax—in the forthright violation of the intention of the legislature," etc., and the case of *Sprague* vs. *Thompson*, 118 U. S. 90, is cited in support of this proposition. The distinction between that case and this is to my mind very plain. The law of Georgia, there considered, was the first law on the subject. Before its enactment there had been no law imposing pilotage charges upon any one refusing the services of a pilot, and the first law by which the legislature of Georgia attempted to impose such charges upon citizens of other states exempted by express provision the citizens of Georgia, South Carolina, and Florida. Counsel attempting to uphold the law were of course obliged to concede that the discrimination attempted could not be enforced, but they contended that the exemption should be struck from the law as invalid, and thus leave it undiscriminating. The Supreme Court very properly said this is something we can not do, because the legislature of Georgia has never imposed, or manifested any intention to impose, this burden upon its own citizens, and the courts can not do so without usurping legislative functions. This was correctly and justly said; for though a court does not exceed its functions in preventing discrimination by declaring void a discriminating statute, it would

be usurping legislative power if it attempted to prevent discrimination by extending to a whole class the provisions of a statute which in terms excludes a portion of the class.

In this case, to declare the act of 1897 wholly void would not be to add anything to a statute for the purpose of keeping it alive. We should only be doing what we continually do in invalidating unconstitutional legislation. And if the effect of invalidating an amendatory act is to leave in its original form the act which the legislature attempted to amend, this is not to legislate; it is only to say, as we so often say, the legislature has failed to pass a valid act.

The judgment of the superior court should be affirmed.

EXHIBIT D.

PORTIONS OF OPINION ON REHEARING BELOW IN THE CASE AT BAR, 192 PAC. 1021, RELEVANT TO THE PROPOSITION THAT THE EFFECT OF ARTICLE IV, SECTION 2 OF THE FEDERAL CONSTITUTION IS TO EXTEND TO NONRESIDENTS THE PRIVILEGES CONFERRED BY STATES UPON THEIR OWN RESIDENTS.

QUONG HAM WAH CO. VS. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA, ET AL.

Quoting from p. 1027:

[8] It is contended, however, and correctly, that the provisions of the federal constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the state legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister states. In support of this contention respondents rely upon *Estate of Johnson*, 139 Cal. 532. No good reason has been advanced for departing from the doctrine therein declared as follows: "It will be noted, not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said,

'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. * * * The constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing." This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the *Slaughter House Cases*, 16 Wall. 36, 77, in the following words: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own

citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

[9] The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to nonresidents of the state, and clearly the statute in question does not impose nor attempt to impose upon noncitizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all important in controlling the construction and application of that provision of the federal constitution which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." For, where a state endeavors to place a burden upon noncitizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own

citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens and, therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen. Viewed in this light, it is clear that, when a state statute imposes a burden on a noncitizen which is not imposed on the citizen of the state, the noncitizen may have relief from the burden thus imposed by invoking the provision of the federal constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a noncitizen, the latter finds relief in the provision of the federal constitution which, by operation of law, so to speak, extends the privilege to him. The obvious resulting difference in the operation and effect of the federal constitutional provision under discussion, is the paramount point of the decision in the *Estate of Johnson, supra*, and it can not be said that the extension to noncitizens of a statutory privilege granted only to citizens is judicial legislation, for clearly it is the federal constitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, noncitizens of the state shall likewise be "entitled" to them. The case of *Spraigue* vs. *Thompson*, 118 U. S. 90, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception and thereby make the statute effective as to a class which the legislature did not have in mind, has application only to that class of cases where it is attempted by the state to put a burden upon nonresidents. That case has no application to the extension to nonresidents of a privilege granted

to residents, and, apparently, has never been applied to the latter situation.

The very recent case of *Travis* vs. *Yale & Towne Mfg. Co.*, 40 Sup. Ct. Rep. 228, is relied upon in support of the contention that *Estate of Johnson, supra*, has been overruled by the Supreme Court of the United States. At first blush this case would seem to weaken the ruling of this court in *Estate of Johnson*. However, upon a close analysis of the Travis case, it will be found that it in no wise affects the doctrine of *Estate of Johnson*. The facts of the former case, substantially stated, were that the State of New York had imposed an income tax upon residents and nonresidents, but granted an exemption to residents of the state on the first one thousand dollars of their incomes, and further provided that every "withholding agent" (including employers) should deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equaled or exceeded $1000.00 in a year, and should pay the tax to the state comptroller. The court held, in affirmance of the judgment of the District Court of New York made in the first instance, that in granting to residents exemptions denied to nonresidents the statute violated the provisions of section 2 of article IV of the federal constitution, but a careful reading of the decision in that case reveals the fact that the court did not hold that the entire statutory scheme involved in that case was altogether void and nugatory. That is to say, the court did not declare that the statute was invalid in so far as it related to the imposition of a tax which, when freed and cleared of the attempted unwarranted discriminations, operated uniformly upon residents and nonresidents alike. True it is the

court did not, in holding the attempted discrimination unwarranted, declare in terms that the exemptions granted to residents should by the conjunctive operation of the state statute and the fundamental law of the land be extended to nonresidents, but in this behalf it is important to note that neither did the court decide that the statute was wholly invalid, that is to say, that residents and nonresidents entirely escaped the burden of taxation because of the attempted discrimination. That it was not the purpose of the court to so declare is manifest, we think, by the decree rendered in the first instance by the United States District Court of New York and affirmed by the Supreme Court of the United States.

That decree although not set out in the opinion of the supreme court, is before us by the courtesy and consent of counsel for the respective parties in the instant case, and may, therefore, we take it, be rightly referred to in aid of the ascertainment of the scope and effect of the opinion of the Supreme Court. The decree mentioned does not, as counsel for the petitioner here contend, enjoin the State of New York from in any way collecting all or any part of the tax in question from nonresidents. While it does enjoin the collection of the state tax from the complainants who were the "withholding agents" and the source of the income upon which the tax was levied, nevertheless it does not purport to enjoin the collection of the tax, with the discriminations eliminated, directly from resident and nonresident taxpayers. In short, the decree and its affirmance indicate that the court intended to do no more than declare that the discrimination in the granting of exemptions to residents and denying them to nonresidents was, in the language of the Supreme Court itself, "an unwar-

ranted *denial* to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by the citizens of New York." (Italics ours.) In other words, it was the *denial* to residents of other states of exemptions provided in the statute for residents of the State of New York which was declared to be invalidated by the provision of the federal constitution. Inasmuch as the court did not strike down the exemptions in so far as they applied to residents, it follows by necessary implication that, if the exemptions could not be denied to nonresidents and were still extant as to residents, they must be available to nonresidents. This conclusion is confirmed by a perusal of the opinion rendered in the first instance by the District Court, where it was carefully said that: "Nothing herein * * * is meant to be decided as to the validity of the statute so far as it relates to residents of the State of New York," (262 Fed. 576.) This can mean but one thing, and that is, that the act was valid as to residents and binding to the same extent, and only to the same extent, upon nonresident citizens of other states. While the opinion of the District Court can not, of course, control the interpretation to be put upon the opinion of the Supreme Court, nevertheless it is illuminating and persuasive when considered in conjunction with the unqualified affirmance by the court of last resort of the decree of the lower court, despite the limitations which the latter court explicitly put upon its judgment.

In any event, it can not be said from anything contained, either expressly or impliedly, in the Travis decision that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the State of New York. Therefore it seems that the Travis case in no

way contravenes the rule and the reason for the rule enunciated in *Estate of Johnson, supra,* and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimination, the statute itself is valid and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.

LENNON, J.

We concur:
LAWLOR, J.
SLOANE, J.

CONCURRING OPINION.

OLNEY J. : I concur.

* * * * * * *

Third—What, under these circumstances, is the effect of the provision of the constitution upon the act: Does it destroy it so that neither citizens nor noncitizens shall have its benefits, or does it operate to extend the benefits to noncitizens, so that they, as well as citizens, are "entitled" to its privileges, and the unlawful discrimination is thus removed? Upon this point I agree thoroughly with both the discussion and the conclusion of the main opinion, and with the *Estate of Johnson,* 139 Cal. 531, to which it refers and upon which it relies. The constitutional provision is couched in the affirmative, that "the citizens of each state shall be *entitled* to all the privileges and immunities of citizens in the several states." When a state endeavors to place a *burden* upon noncitizens but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to

confer upon its citizens *privileges or benefits* not conferred on others, the effect is just the opposite. The citizens of other states become "entitled to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employees, both citizens of this state and those of other states, are entitled to the benefits of the act.

* * * * * * *

But the point in such instances as the Estabrook case is that the statute is not void. It is perfectly valid. It is true it contravenes the federal constitution in attempting to withhold its benefits from noncitizens. But it is its attempt to withhold, not to confer, that alone contravenes the constitution and is therefore invalid and ineffective. The law stands as a valid enactment as to citizens, and the constitution operates to destroy its attempt to withhold its benefits from noncitizens and to extend those benefits to them.

CONCURRING OPINION.

SHAW, J.: I concur on the ground that the statute merely confers upon employees residing in this state the privilege of resorting to the Workmen's Compensation Act of this state to obtain compensation for injuries received while in the course of their employment, in all cases where the contract of employment was made in this state, whether the injury was re-

ceived within or without this state, and that the provision of the Constitution of the United States, *ipso facto*, carries this privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect. It must be observed that the statute does not purport to withhold this privilege from citizens of other states; it is merely silent with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But as it does not, the result is that the federal constitution prevents the statute from having the effect of withholding the privilege to citizens of other states. (*Estate of Johnson*, 139 Cal. 532.)

I concur:

ANGELLOTTI, C. J.

* * * * * * *

CONCURRING OPINION.

WILBUR, J.: * * * I agree with the majority of the court in holding that, notwithstanding the language of the statute with reference to residents, by virtue of the federal constitution a nonresident of California, if a citizen of the United States, is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California, and would also have jurisdiction of a similar complaint by a nonresident, and that there is, therefore, no such discrimination as is prohibited by the federal Constitution.

WILBUR, J.

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SUPREME COURT OF THE UNITED STATES.

No. 638.—October Term, 1920.

Quong Ham Wah Company, Plaintiff in Error, *vs.* Industrial Accident Commission of the State of California et al.	In Error to the Supreme Court of the State of California.

[March 21, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

The Quong Ham Wah Company is engaged in the business of supplying to canneries in California and elsewhere the labor required by them to carry on their canning operations. The Company in 1918 hired in the city of San Francisco one Owe Ming, a resident of California, under an agreement that he was to work as its employee at the cannery of the Alaska Packers Association at Cook's Inlet, Alaska, during the canning season, and that upon his return to San Francisco he would be paid off by the Quong Ham Wah Company and his employment terminated.

While working at the cannery Owe Ming sustained an injury resulting in a permanent disability, for which on returning to San Francisco he petitioned the Industrial Accident Commission of California for the allowance of compensation under the Workmen's Compensation Act, section 58 of which provides:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The Alaska Packers Association was joined with the Quong Ham Wah Company as defendant in the proceedings before the Commission, which culminated in a joint and several award

against the said defendants. Thereafter the Quong Ham Wah Company filed with the Commission a petition for rehearing, asserting among other things, that the Commission was without jurisdiction to award compensation for injuries occurring outside the territorial limits of the State of California, except as provided in section 58 of the Compensation Act, and that that section was void as repugnant to Article IV, section 2, of the Constitution of the United States, because it granted to citizens of California the privilege of recovering for injuries sustained outside the State in the course of employments contracted for within the State, while at the same time denying that privilege to citizens of other States. The rehearing was refused by the Commission.

The Company thereupon applied to the Supreme Court for a writ of certiorari, which was allowed, and that court, concluding that section 58 discriminated against non-residents as alleged and was consequently repugnant to the Constitution of the United States and void, decided that the Commission was without jurisdiction and annulled its award. Upon a rehearing, however, this view was retracted and the court concluded that the effect of the constitutional provision relied upon was, not to render void the provisions of section 58 for discrimination against non-residents, but to lead to or cause a construction of that section which would include citizens of other States and therefore avoid all question as to the discrimination relied upon. The court consequently held that "the statute itself is valid and may be made to apply uniformly to citizens of California and the citizens of the other states," and, giving effect to this interpretation, affirmed the action of the Commission.

To reverse the judgment so rendered this writ of error is prosecuted. All the assignments and contentions made rest in their last analysis upon the assumption that, despite the construction of the statute made by the court below, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. *Commercial Bank* v. *Buckingham*, 5 How. 317, 342; *Johnson* v. *New York Life Insurance Co.*, 187 U. S. 491, 496; *Ross* v. *Oregon*, 227 U. S. 150, 162; *Ireland* v. *Woods*, 236 U. S.

323, 330; *Stadelman* v. *Miner*, 246 U. S. 544; *Erie R. R. Co.* v. *Hamilton*, 248 U. S. 369, 371-372. It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583; *Sugarman* v. *United States*, 249 U. S. 182, 184; *Berkman* v. *United States*, 250 U. S. 114, 118; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193.

True it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construcion which it affixed to it and that, instead of adoping that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon.

Dismissed for want of jurisdiction.

A true copy.

Test:

Clerk Supreme Court, U. S.